83-282

No.

OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD F. WILSON and JEAN WILSON,

Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture; R. MAX PETERSON, Chief Forester of the United States and Acting Assistant Secretary of Agriculture for National Resources and Environment, Department of Agriculture; and NORTHLAND RECREATIONS, INC., an Arizona Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED*

1. May the Secretary of Agriculture circumvent Congress' 80-acre limitation on permits for recreational use of national forest land (16 U.S.C. §497) by issuing to private, recreational developers both a long-term permit for 80-acres or less and, under the 1897 Organic Act (16 U.S.C. §551), a supplementary permit exceeding 80-acres for recreational facilities which are essential to the use authorized by the 80-acre permit, coextensive in duration with such a use and in fact irrevocable as long as the use under the 80-acre permit continues to exist?

2. Does a mountain located within national forest land which the State Historic Preservation Officer finds as a fact under the applicable legal criteria to be of significant importance to both Indian and non-Indian patterns of American history and culture qualify as a "site" or "district" which is eligible for protection and listing under the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, and its implementing regulations, 36 C.F.R. §800.4(a)(3)?

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*All parties to the instant case are listed in the caption of the Petition. Pursuant to Supreme Court Rule 21.1(b) we list here all parties to the proceeding below in the other cases which the instant matter was consolidated.

In *Hopi Indian Tribe v. Block*, Nos. 81-1912 and 82-1706 the Plaintiff/Appellant was the Hopi Indian Tribe. The Defendants/Appellees were John R. Block, Secretary of Agriculture; Ned D. Boyley, Acting Assistant Secretary of Agriculture for Natural Resources and Environment; R. Max Peterson, Chief Forester of the United States. Northland Recreations, Inc. was an Intervenor/Appellee.

In *Navajo Medicinemen's Association v. Block*, Nos. 81-1956 and 82-1705 the Plaintiffs/Appellants were the Navajo Medicinemen's Association, Faye B. Tso; Ashee Begay, Sr.; Tom Watson, Sr.,; Miller Nez; Frank Bluehorse; Fred Stevens, Jr.; Francis D. Tsosie; Jim Charley; Hoskie Tom Becenti; Tony Trujillo; Jacob Poleviyaoma, Sr.; Jacob Poleviyaoma, Jr.; Jerry R. Sekayumptewa; and Lavern Siwumptewa. The Defendants/Appellees were John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the United States; the United States Forest Service, Department of Agriculture; and the United States of America. Northland Recreations, Inc. was an Intervenor/Appelle.

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Petitioners, Richard F. Wilson and Jean Wilson, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 20, 1983.

OPINIONS IN THE COURTS AND AGENCIES BELOW

The opinion of the Court of Appeals (App. "A", pp. 1-50) is reported at 708 F.2d. 735-760. The June 15, 1981 (App. "B", pp. 51-90) and May 14, 1982 (App. "C", pp. 91-99) memorandum opinions of the District Court have not been officially reported, although portions of the June 15, 1981 memorandum opinion have been reprinted in the *Indian Law Reporter*, Vol. 14, pp. 3073-3079.

The initial decisions of the Forst Supervisor (App. "D", pp. 100-109), the Regional Forester (App. "E", pp. 110-128), and the Chief of the Forest Service (App. "F", pp. 129-141) are neither officially nor unofficially reported. The same is true of the opinions of the Forest Supervisor (App. "G", pp. 142-157), the Arizona State Historic Preservation Officer (App. "H", pp. 158-164), and the Chief of the Forest Service (App. "I", pp. 165-166) issued in connection with remand proceedings ordered by the District Court for compliance with the National Historic Preservation Act.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1983 (App. "J", p. 167). Petitioners did not file a Petition for Rehearing and Suggestion for Rehearing *En Banc*, although such petitions were filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association in actions consolidated with Petitioners', the same having been denied on July 14, 1983 and July 26, 1983, respectively (App. "J", pp. 168-171).

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 4, Section 3 Clause 2, of the United States Constitution:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. 16 U.S.C. § 497:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in

connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests.

3. 16 U.S.C. §551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

4. 16 U.S.C. §470a(a) (1) (A)

(a) (1) (A) The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.

5. 16 U.S.C. §470f

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted

undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470 i to 470t of this title a reasonable opportunity to comment with regard to such undertaking.

6. 16 U.S.C. § 470h-2 (a) (1) (2):

(a) (1) The heads of all Federal agenices shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 470a(f) of this title, any preservation, as may be necessary to carry out this section.

(2) With the advice of the Secretary and in cooperation with the State historic preservation officer for the State involved, each Federal agency shall establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control by the agency, that appear to qualify for inclusion on the National Register in accordance with the regulations promulgated under section 470a (a) (2) (A) of this title. Each Federal agency shall exercise caution to assure that any such property that might qualify for inclusion is not inadvertently transferred, sold, demolished, substantially altered, or allow to deteriorate significantly.

STATEMENT OF THE CASE AND THE MATERIAL FACTS

The San Francisco Peaks, a volcanic mountain mass located north of Flagstaff, Arizona, are within the Coconino National Forest and, except for certain privately owned parcels of land, are managed by the United States Forest Service, Department of Agriculture. The Arizona Snow Bowl, recently renamed the Fairfield Snow Bowl, is a 777-acre skiing facility located on the western slopes of the San Francisco Peaks on lands which are wholly within the Coconino National Forest. (App. "A" pp. 4-6.)

On April 15, 1977 the Forest Service issued two permits to Northland Recreations, Inc. to operate the Snow Bowl. One of these permits was a "Term Permit" given under the authority of the Act of March 4, 1915, 16 U.S.C. § 497, while the other was styled as a "Special Use Permit" and was issued under the purported authority of the Act of June 4, 1897, 16 U.S.C. § 551. (App. "A", pp. 41-42.)

The "Term Permit" for the Snow Bowl, as modified on May 18, 1982, covers 24 acres of land for the purposes of constructing, maintaining and operating a winter sports area consisting of uphill lifts, tows, a lodge and parking areas together with related utilities. This permit remains in full force and effect for a period ending May 1, 1997, is "not transferable," and can only be terminated upon breach of a condition of the permit. (App. "A", pp. 41-42; Record, J.A., III, 997-1024).

The "Special Use Permit," as modified on May 18, 1982, covers 753 acres of national forest land excluded from the "Term Use Permit" for the purposes of "[c]leaning, grooming, signing and maintaining ski slopes and trails in connection with the Term Use Permit for the Winter Sports Site designated Northland Recreations, Inc., dated 4-15-77." The "Special Use Permit" provides that it is "not transferrable" and "may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest

Service." Under its "Miscellaneous" provisions the Special Use Permit specifies that all revenue or sales derived from or attributable to use of the land covered by it, together with all fees, "are to be paid and determined as set forth in the Term Special Use Permit dated 4-15-77" and that the Special Use Permit "is subject to Clauses B-1 through G-12, including insurance requirement[s], in the Northland Recreations, Inc. Term Special Use Permit dated 4-15-77." The Special Use Permit's "Miscellaneous" provisions further state that "[u]nless sooner terminated or revoked by the Regional Forester, in accordance with the provisions of the permit, this permit shall expire and become void on 5-1-97, but a new permit to occupy and use the same National Forest lands may be granted provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands and shall have notified the Forest Supervisor not less than six (6) months prior to said date that such new permit is desired." (Record, J.A., III, 993-996.)

In July, 1977, Northland Recreations submitted to the Forest Service a "master plan" for future development of the Snow Bowl which contemplated the construction of additional parking areas, ski slopes, a new lodge, and additional ski lifts. After public consultation and the consideration of six alternatives, ranging from complete removal of the Snow Bowl facility to full development as proposed by Northland, the Coconino National Forest Supervisor decided on February 27, 1979 to permit substantial expansion of skiing and recreational facilities at the Snow Bowl. (App. "D", pp 101-108.)

In its essential features, the "Preferred Alternative" approved the clearing and construction of 50 acres of new ski runs, raising the total acreage from 156 acres to 206 acres for ski runs. It authorized the construction of a new ski lodge adjacent to the existing one, increased the acreage for the parking area to 8.1 acres, permitted the widening and paving of the Snow Bowl access road, and allowed the construction of three

new ski lifts in addition to the existing one. Implementation of the "Preferred Alternative" would increase the lift capacity of the Snow Bowl five-fold (from 522 skiers to over 2,800 skiers daily), would almost double the size of the parking lots, would increase the seating capacity in the lodge from 120 people to nearly a thousand, and would increase the acreage devoted to ski runs by approximately forty percent (40%). (App. "D", pp.106-108.)

Petitioners Richard F. Wilson and Jean Wilson opposed any expansion and development of the Snow Bowl and Snow Bowl Road. The Wilsons are the fee owners of substantial tracts of land located on the western slopes of the San Francisco Peaks adjacent to the Arizona Snow Bowl permit area, including the Fern Mountain Ranch, a National Register Historic Site. Having preserved their own private land-holdings on the Peaks in a natural state, the Wilsons opposed expansion and development of the Snow Bowl and Snow Bowl Road because it would detrimentally affect the use to which they have dedicated their own property and would irreparably and adversely affect the environmental, aesthetic, historical and religious significance of the San Francisco Peaks as a whole and their own property located on it, thereby eroding the primary value which the Wilsons attach to their own lands and to the Peaks as a whole. (App. "A", pp. 51, 80-81; Record, J.A., I, pp. 88-89, IV, pp. 1351-1357.)

Accordingly, after exhausting their administrative remedies, the Wilsons filed their Complaint on March 9, 1981 in the United States District Court for the District of Columbia challenging under a variety of federal environmental laws Respondents' decision to expand and develop the Snow Bowl and Snow Bowl Road. Among other claims, the Wilsons alleged that expansion, development and operation of the Snow Bowl under the dual permit system there employed violated the 80-acre, recreational use limitation imposed by 16 U.S.C. §497, and that Respondents' failure to consult with and to refer to the Interior Secretary the question of the eligibility of the

San Francisco Peaks as an entity for listing on the National Register of Historic Places violated the National Historic Preservation Act, 16 U.S.C. §470a and §470f, together with the Interior Secretary's regulations promulgated thereunder. Jurisdiction in the District Court as to both of these claims was predicated upon 28 U.S.C. §1331. The Wilsons sought a declaratory judgment under 28 U.S.C. §2001, *et seq.* and injunctive relief against further expansion, development and operation of the Snow Bowl in violation of these enactments. (Record, J.A., I, pp. 87-117; App. "A" and "B", pp. 39-50, 52, 78-85.)

Through its Order and Memorandum Opinion of June 12, 1981 and June 15, 1981, the District Court, Charles R. Richey, District Judge, ruled that Respondents had not violated 16 U.S.C. §497 because the dual permit practice employed at the Snow Bowl was both lawful in itself under the 1897 Organic Act and had been implicitly ratified by Congress. However, the District Court ruled that Respondents had violated the National Historic Preservation Act and its implementing regulations by failing to consult with the Arizona State Historic Preservation Officer to determine if the Peaks as an entity were eligible for listing on the National Register of Historic Places. Accordingly, the District Court ruled in favor of the Respondents on all of the Wilsons' claims except those arising under the National Historic Preservation Act, as to which it ruled against the Respondents and remanded the matter to the Agriculture Department for compliance with that Act. (App. "B", pp. 78-85.)

The consultation between the Coconino National Forest Supervisor and the Arizona State Historic Preservation Officer under the District Court's remand order produced two conflicting views concerning why the San Francisco Peaks as an entity were ineligible for National Register listing. After applying the National Register criteria (36 C.F.R. §60.6) the Forest Supervisor determined that the Peaks were ineligible for listing because their significance was primarily religious rather than historical. (App. "G", pp. 142, 151-155.)

The Arizona State Historic Preservation Officer rejected the Forest Supervisor's understanding, calling it "more spurious than productive" because "[i]t can be documented that the Peaks area are a natural landmark for early settlers" in Northern Arizona and since the "[h]istorical recognition and use of the Peaks has not been limited to the historic and modern Hopi and Navajo people." Finding the Forest Supervisor's views concerning the Peaks' ineligibility for listing under the National Register criteria to be "too narrow a view" which lacked evidentiary support, the State Historic Preservation Officer found that "[t]he Peaks area has a long-standing place of importance in the history of the Hopi and Navajo; and while they may attach primary religious value to the Peaks, the *historical* aspects of those views cannot be ignored." In applying the National Register criteria to the Peaks, the State Historic Preservation Officer found that they were of preeminent importance to the history, culture, folklore and mythology of Southwestern American Indians, particularly the Navajos and Hopis; and, having served as a natural landmark for early travelers and settlers and having functioned as a laboratory for C. Hart Merriam's pioneering studies of bio-ecology, were equally significant to non-Indian patterns of American history and culture. (App. "H", pp. 160.)

Nevertheless, the Arizona State Historic Preservation Officer determined that the Peaks were ineligible as a matter of law for National Register listing notwithstanding their historical significance. In her view the National Historic Preservation Act protected only "a geographically definable area, urban or rural, possessing a significant concentration of linkages or continuity of sites" each of which possessed integral, historic significance and which in their aggregate created an area or district of historical significance. (App. "H", pp. 161-163.)

However, on September 17, 1981, six days after the Arizona State Historic Preservation Officer issued her findings, the Coconino National Forest Supervisor was informed in a letter from the Western Division Chief of the Advisory Council on

Historic Preservation that counsel for the Wilsons and others had provided the Advisory Council with "information [which] is in sufficient detail to raise a valid question as to the eligibility" of the San Francisco Peaks as an entity for National Register listing. The Advisory Council's Western Division Chief further informed the Forest Supervisor that "we recommend that you request a determination of eligibility from the Secretary of the Interior" concerning the Peaks as an entity. As early as August 23, 1978, the Interior Department itself, through its Regional Environmental Officer, told the Coconino National Forest Supervisor in a letter that the National Register criteria "for 'District' nomination of cultural resources which have a common theme and significance may be applicable to the case of [the] Snow Bowl or the San Francisco Peaks as a whole." (App. "K", "L", pp. 174-180.)

The final decision of the Agriculture Department respecting the remand proceedings was made by the Chief Forester, acting through his designated deputy, R.M. Housley. Without indicating the reasons for his decision and without consulting with or deferring to the Interior Secretary, the Chief Forester unilaterally ruled in a single, unexplained and undocumented sentence, that "as an entity, the geographical area known as the San Francisco Peaks is not eligible for nomination to the National Register." (App. "I", pp. 165-166.)

The Chief Forester did not resolve the difference of opinion between the Forest Supervisor and the Arizona State Historic Preservation Officer concerning the basis for the Peaks' ineligibility for National Register listing. At no time did any official of the Agriculture Department or the Forest Service ever seek to justify the determination that the Peaks were ineligible for listing on the grounds that they did not possess the "unique" qualities which led the Interior Secretary to list on the National Register other mountains, cited to the Chief Forester by the Wilsons during the remand proceedings, possessing similar or identical historical and cultural attributes to those possessed

by the San Francisco Peaks. (App. "I", pp. 165-166; Record, J.A., V. pp. 1595-1611.)

At the conclusion of the remand proceedings and upon Respondents' motion for entry of final judgment, the District Court issued its Memorandum Opinion and Order entering final judgment in favor of Respondents. The District Court held that Respondents were not under any obligation to refer the issue of the Peaks' eligibility for National Register listing to the Interior Secretary and that they had not committed an abuse of discretion in determining that the Peaks as an entity were ineligible for listing since the Peaks may not have possessed the combination of unique attributes which caused the Interior Secretary to list other similar mountains in the National Register, a view first advanced by Respondents' counsel in the District Court and never employed or articulated by the Agriculture Department or the Forest Service. (App. "C", pp. 92-94.)

On May 20, 1983 the Court of Appeals issued its Opinion and entered its Judgment affirming in all respects the District Court's May 14, 1982 and June 12, 1981 Orders. (App. "A" and "J", pp. 1-50,167.) However, five months earlier while the case was under advisement in the Court of Appeals, Northland Recreations, Inc., sold the Snow Bowl improvements to Fairfield Snow Bowl, Inc., an Arizona corporation; and on December 27, 1982 the Forest Service issued both a Special Use Permit under the 1897 Organic Act and a Term Permit under 16 U.S.C. § 497 to Fairfield to operate the Snow Bowl. In their material features these permits are identical to the Northland permits described earlier, except that they expire in the year 2002 and state that they supersede the Northland permits which were terminated upon the sale of the Snow Bowl improvements.

REASONS AND ARGUMENT FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION NULLIFIES THE STATUTE, 16 U.S.C. §497, LIMITING THE SIZE OF PRIVATE RECREATIONAL DEVELOPMENTS IN THE NATIONAL FORESTS THROUGH A CONSTRUCTION OF THE 1897 ORGANIC ACT, 16 U.S.C. §551, WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND THE PROPERTY CLAUSE OF THE UNITED STATES CONSTITUTION.

Through 16 U.S.C. §497 Congress authorized the Agriculture Secretary "to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing and maintaining hotels, resorts, and any other structure or facility necessary or desirable for recreation, public convenience or safety." Congress did not differentiate between the kinds of permits to which the 80-acre limitation of 16 U.S.C. §497 was applicable nor did it qualify the kinds of recreational uses to which it applied, but instead applied the act's acreage limit to all such uses.

Nevertheless, the Court of Appeals holds in this case that the Agriculture Secretary may permit private entrepeneurs to use and occupy MORE THAN 80 ACRES through the combined use of "term permits" for 80 acres or less given under 16 U.S.C. §497 and so-called revocable permits for any amount of additional acreage issued under the third section of the 1897 Organic Administration Act [Organic Act] now codified in 16 U.S.C. §551 which allows the Secretary to "make such rules and regulations and establish such services as will insure the object of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

By upholding this so-called dual-permit practice, the Court of Appeals' decision allows the Agriculture Department to create in the national forests large-scale, private, recreational developments, such as downhill skiing facilities like the Snow Bowl here, even though the land use included within the so-called revocable permit is in fact essential to and coestensive in duration with that which is authorized by the 80-acre permit and which neither would nor could exist independently of or without the land use activities included under the 80-acre permit.

To validate this practice, the Court of Appeals employs substantive and methodological principles which conflict with the decisions of this Court; and by effectively repealing 16 U.S.C. § 497, grants to the Executive a measure of power which is at odds with the Constitution's Property Clause. Speaking in dissent, Justice Blackmun, joined by Justices Brennan and Douglas, acknowledged the substantive importance of this issue when he emphasized that, "as the Court . . . so plainly reveals, the issues on the merits are substantial and deserve resolution" because "they pose the propriety of the 'dual permit' device as a means of avoiding the 80-acre 'recreation and resort' limitation imposed by Congress in 16 U.S.C. § 497, an issue that apparently has never been litigated and is clearly substantial in light of the congressional expansion of the limitation in 1956, arguably to put teeth into the old, unrealistic five-acre limitation." *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) [Blackmun, J. dissenting].

A. The Court of Appeals' Holding Conflicts With This Court's Decisions Construing The Organic Administration Act of 1897.

This issue is even more substantial now than Justices Blackmun, Brennan and Douglas perceived it to be ten years ago in their *Sierra Club* dissents. Since the dual permit practice is dependent upon and justified by the 1897 Organic Act, 30 Stat.

35, 16 U.S.C. §551, a clear conflict now exists between the Court of Appeals' interpretation of that act and the construction of the Organic Act articulated by the Court five years ago.

In *United States v. New Mexico*, 438 U.S. 696 (1978) the Court held that the Executive Office could not reserve national forests for recreational use under the 1897 Organic Act. The Court construed the 1897 Act as follows:

> The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—"[t]o conserve the water flows and to furnish a continuous supply of timber for the people." [citation omitted.] *National forests were not to be reserved for* aesthetic, environmental, *recreational*, or wildlife *purposes*. [quotation from floor debates omitted.] Administrative regulations at the turn of the century confirmed that national forests were to be reserved for only these two limited purposes. 438 U.S. at 707-708, emphasis added.

The logic of the *New Mexico* holding is clear. The power of the Executive to regulate the use and occupancy of the national forests after it creates them under the Organic Act cannot be greater in scope than the power to create the forests reserves in the first instance. Thus, since the 1897 Organic Act forbids the Executive to reserve national forests for recreational uses, that Act likewise forbids the Executive to devote the use and occupancy of the national forests to recreational purposes and uses after the reserves have been set aside. To reason otherwise would permit the Executive Office to accomplish indirectly, through a mere power to regulate the use and occupancy of the national forests, an object which Congress plainly intended to forbid in authorizing the Executive to set aside national forests under the 1897 Act.[1]

Notwithstanding the *New Mexico* holding, the Court of Appeals holds that from the first decade of this century the 1897 Organic Act empowered the Forest Service to issue permits for private occupancy and use of the forest reserves for all purposes without limitation as to the area of land covered. From this premises, the Court of Appeals reasons that the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, merely supplemented that pre-existing authority. This holding conflicts with this Court's construction of the 1897 Organic Act articulated in the *New Mexico* case and is at odds with the Court's clear ruling in 1911 that under the Organic Act *"the Secretary could not make rules and regulations for any and every purpose" but only such as are "clearly indicated and authorized by Congress." United States v. Grimaud*, 220 U.S. 506, 516 (1911), emphasis added.[1]

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[1]That Congress never intended to permit the creation or use of the national forests for recreational purposes under the 1897 Organic Act, but in fact understood that such a use would be prohibited, is unmistakeably clear in the Act's legislative history. Immediately prior to the Act's passage, Congressman McRae, the Act's architect and principal sponsor, stated to Congress that national forests "are not parks," thus echoing a similar admonition voiced in 1893 when, in introducing the prototype of the 1897 Act, he informed Congress that the bill was "not dealing with parks, but forest reservations, and there is a vast difference." 30 *Cong. Rec.* 966-967 (1897); 25 *Cong. Rec.* 2373 (1893) (remarks of Congressman McRae). The difference was that parks alone were for public pleasure and recreation; forest reserves were not and could not be so used. This fact is further evidenced by the Act of February 28, 1899, 30 Stat. 908, 16 U.S.C. §495, in which Congress specifically authorized the use of national forest land for sanitariums, hotels and camps by private citizens adjacent to mineral or medicinal springs for public "health and pleasure." Both the Secretary and Congressional sponsors urged passage of this bill because, as Congressman Tongue put it, "under existing regulations and forest reservation laws *there is no power vested in any of the Departments to make any provision under the laws for the occupation of these grounds by those who seek these springs for the erection of sanitariums, for buildings, or even cottages for persons desiring to fit them up, or even for camp grounds.*" 31 *Cong. Rec.* 3858 (1898); *H. R. Rep. No. 942*, 52nd. Cong., 2d. Sess. (1898), p. 2.

If the national forests could not be created, occupied, or used for recreational purposes under the 1897 Organic Act as construed in the *New Mexico* holding, the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, at least in so far as private, commercial construction and development of recreational facilities is concerned, constitutes the first and only possible grant of authority for recreational developments which were long-term in nature and which required land use practices in which forest lands were stripped of trees without any foreseeable intent to reforest them. In view of the logical implications of the *New Mexico* holding's construction of the Organic Act, the 1915 Act neither supplemented nor repealed anything, but instead granted a power not otherwise existing with respect to the general (recreational) and specific (tree stripping) activities involved in private, commercial development of recreational facilities in the national forests. More importantly, the 1915 Act was, at the same time, a clear and positive limitation upon both the area ("*not exceeding* 5 acres") and the period of time ("*not exceeding*" 30 years) within which only "summer homes, hotels, stores or other structures" would be permitted.[2]

The Court of Appeals' attempt to fathom a different understanding from the legislative history of the 1915 Act is genuinely

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[2]Significantly, as originally proposed and introduced, the 1915 Act contained NO acreage limitation, but because of the Congressional fear, as Senator Gallinger put it, that "the Department of Agriculture might let them (the recreational developers) have a hundred or 50 or any amount" of land, the Senate amended the bill by imposing a ten (10) acre limit. 51 *Cong. Rec.* 9101 (1914) (colloquy between Senators Gallinger and Jones). Even 10 acres was deemed too excessive by the House which limited it to five (5) acres. 52 *Cong. Rec.* 5505, 5323 (1915); 38 Stat. 1101 (1915). The clear and precise limitations as to area, duration and kinds of development were deemed essential because Congress envisioned only recreation which was NOT destructive of natural, forest conditions. As Congressman Hawley, the sponsor, put it, "people can go and enjoy the scenery and the fishing and hunting" in "forests that are very beautiful in natural scenery" and "natural wonders." 52 *Cong. Rec.* 1787 (1915) (remarks of Congressman Hawley).

unconvincing. The Court of Appeals' quotation of Congressman Hawley's remarks, that the Organic Act allowed citizens to go into the national forests "and build a *temporary camp*, put up a *tent*, or a *little camp* of some kind" but *"does not enable them* to put up any important building, or *to justify any considerable expenditures,"* (App. "A", p. 43, quoting 52 Cong. Rec. 1787 [1915]), proves nothing more than that prior to the 1915 Act no authority whatever existed for developments generically similar to skiing facilities because ski runs, lifts and related facilities are not in any way similar or comparable to "temporary camps," "tents," or "little camps." Instead, they are essentially permanent in nature, require substantial alteration of the land and forests of the reserves, and destroy large areas of trees and foliage for decades and generations which "temporary camps" and "tents" plainly do not. Moreover, the stripping of trees for ski runs and other facilities requires substantial expenditures of man hours and heavy equipment, not only in their initial creation but also in their required, yearly maintenance and grooming.[3]

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[3]It should be noted that the 1897 Organic Act contained a general prohibition against strip-cutting of timber over whole acres of woodlands by specifying in Section 4 that only dead and physiologically mature trees could be cut for commercial purposes. 30 Stat. 35. Moreover, the 1897 Act defined with particularity in Sections 5 and 7 only three land uses in which timber could be cleared (wagon roads, schools and churches, the latter two being limited to two acres and one acre, respectively). In its 1899 Report to Congress, the Forest Service itself condemned the very land use practice necessary to ski slope construction when, in discussing the silviculture technique of clear-cutting, it warned that *"in hilly country the strips (of cut over trees) must not be made in the direction of the slope for water would wash out the soil and seed." Report Upon The Forestry Investigations of the United States Department of Agriculture, H. Doc. No. 181,* 55th Cong., 3d. Sess (1899), p. 288, emphasis added; 30 Stat. 35-36 (1897).

B. The Court of Appeals' Use Of Unsuccessful Legislative Material Conflicts With The Decisions Of This Court And Is Misleading.

To circumvent the clear language of limitation of the 1915 Act, the Court of Appeals notes that "Congress in the 1930's and 1940's considered several bills that would have expanded the Forest Service's authority to grant term permits, but enacted none of them." From this it concludes that "these bills are nonetheless significant because the reports they generated gave Congress clear notice that the Forest Service was continuing to issue revocable permits for recreational uses and, further, was issuing dual permits. (App. A, p. 44-45.)

In its methodology the Court of Appeals' reliance upon the history of *unsuccessful* legislation to validate executive conduct under the doctrine of congressional acquiescence patently violates the settled and repeated holdings of this Court. The court squarely rejected the Court of Appeals' methodology when in 1959 it held that *"we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed"* by Congress. Just as the Court has cautioned that "it is at best trecherous to find in Congressional silence alone the adoption of a controlling rule of law," so too has it reiterated that an "interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance." *T.I.M.E. v. United States*, 359 U.S. 464, 478 (1959); *N.L.R.B. v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130, note 4 (1971); *Gemsco v. Walling*, 324 U.S. 244, 265 (1945); *United States v. Wise*, 370 U.S. 405, 411 (1962).

In its substantive character, the Court of Appeals' reliance upon unsuccessful legislation is, at best, self-contradictory and,

at worst, both misleading and not candid.[4] As to the former, the very letters of the Agriculture Department quoted and emphasized by the Court of Appeals clearly demonstrate that the Department represented no more to Congress than that its claimed, Organic Act permit power authorized uses *only "of relatively short duration or [which] entail only small capital investments."* (App."A", p. 45-46, quoting H.R. Rep. No. 805, 80th Cong., 1st. Sess., p. 2 (1948)). Hence, under even the Agriculture Department's own claimed authority, it could NOT lawfully employ its Organic Act permit power to allow the construction and maintenance of ski runs since these are costly, long-term uses which radically alter natural, forest conditions. Thus, under the most generous view of the very material quoted by the Court of Appeals, Congress could not possibly have obtained notice from the Executive Office that

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[4]Although the Court of Appeals makes much of the reference to a dual permit practice in a Senate Report on S. 773 (1932), it fails to note that the report does not represent that such a practice or the revocable permit was employed for long-term occupancies destructive of natural forest conditions. More importantly, the Court of Appeals fails to acknowledge that in the hearings on S. 773 the Forest Service and proponents of the bill advocated an increase in the acreage limit precisely because "you could not get ski grounds on 5 acres," (Mr. Martin), thus representing to Congress that such facilities were authorized only by the 1915 Act, not otherwise, and could not lawfully exist but for an increase in that Act's acreage limit. Nevertheless, noting that an increase from 5 to 80 acres would greatly increase the destruction of natural forest conditions and would exacerbate the existing potential to evade or circumvent the acreage restrictions by creating "means whereby commercial interests might get control of a large part of the public domain," (Congressman Polk), Congressmen expressed negative sentiments about and/or opposed the bill to such an extent that the Assistant Forester conceded that "an 80-acre figure, with a 30-year term seems to have made an adverse impression" which he sought to correct by warranting that, if the increase were enacted, "those are the maximum limits" for all recreation uses. *See Hearings Before A Subcommittee of the House Committee of Agriculture on S. 773*, 72d. Cong., 2d. Sess. (February 17, 1933), pp. 3-5, 7-8, 15-17, 19-21 (remarks of Mr. Martin, Assistant Forester Kneipp, and Congressmen Polk, Adkins, Clarke and Doxey.)

a claimed Organic Act use permit power was being used to allow costly, long-term land uses, such as ski run construction and maintenance, in which private entrepeneurs permanently alter natural forest conditions within areas of the national forests exceeding the acreage limits imposed by the 1915 Act.

Even more troubling is the Court of Appeals' misleading and uncandid use of the unsuccessful legislative material which it cites, quotes, and relies upon. In the House and Senate Reports of 1947-1948 THERE IS ABSOLUTELY NO MENTION WHATEVER OF A DUAL PERMIT PRACTICE, either in the text of the Reports or in the Acting Agriculture Secretary's appended letter.[5] Significantly, Acting Agriculture Secretary Brannan's letter unconditionally avows that the 1915 Act is *"the only present authority for long term occupancy permits."* More importantly, the Acting Secretary's letter affirmatively represents to Congress that winter sports facilities, like the Snow Bowl here, were considered by the Department itself to be long-term uses authorized *only* by the 1915 Act whose authority was, in the Department's view, inadequate to permit such uses in the national forests. Acting Secretary Brannan informed Congress in his letter that the "disadvantages of the

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[5]The 1948 bill to which these reports have reference was H.R. 1801 which, as drafted and recommended by the Agriculture Department, would have raised the 1915 Act's acreage limit from five to 80 acres for all national forest lands. However, the House Committee limited the 80 acre increase to Alaska forest land only and retained the five acre limit for all other national forests in which form it was passed by Congress. 16 U.S.C. §497a. In the Committee hearings Congressman Goff of Idaho explained to Assistant Chief Forester Granger that a nation-wide increase in the acreage limit was not warranted because of the concern for "the possible abuses of the authority given by the bill" whose scope was thought to be "very broad." Goff further noted the fear that the bill was inimical to the desire "not to get too many commercial establishments in our National Forest areas" so as to enhance "the preservation of these beautiful areas." *Hearings Before Subcommittee No. 2 of the House Committee on Agriculture on H.R. 1809*, 80th Cong., 2d. Sess. (June 19, 1947), pp. 5-6.

present law is its fixation of five acres as the maximum area for which a term permit can be issued to any one person or association" and that "5 acres frequently is quite inadequate" for such uses as "winter sports facilities [which] are often strung out, especially ski lifts, etc. and need elbow room." *H.R. Rep. No. 805*, 80th Cong., 1st. Sess. (1947), p. 2; *S. Rep. No. 899*, 80th Cong. 2d. Sess. (1948), p. 2.

When in 1956 Congress amended the 1915 Act, it did NOT strike the acreage limit as it would have done had security of a permittee's tenure been the only purpose. Although it could have selected any acreage limit or none at all, Congress not only chose an 80-acre limit but also elected to frame it within the clearest, most emphatic language of limitation known to the law (which, in fact appears eight (8) times in the amended act).[6] Significantly, the 1956 amendment does not differentiate between the kinds of permits to which the 80 acre limit applies but, instead, refers broadly to all permits for the specified use of recreation. 16 U.S.C. §497.

More importantly, Congress extended the scope of recreational land uses subject to the new acreage limit to the maximum extent possible and far beyond the comparatively narrow objects over which the original 1915 Act operated. While the original enactment applied to the "construction of summer homes, hotels, stores, and other structures for recreation," 38 Stat. 1101, Ch. 144, the 1956 amendment extended the land-use activities to which the acreage limit was applicable far beyond only structures and, for the first time ever, applied

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[6]This seemingly obvious point becomes hopelessly lost in the Court of Appeals' decision and thus merits emphasis. "The language is not only unmistakeably clear, but mandatory . . . because the words 'not exceeding' are express words of limitation only—words which control the term(s) (associated with it) . . . and fix the line beyond which . . . (they) cannot go." The "words 'not exceeding,' in themselves are words not of grant or appointment but of limitation only." *Boston & M.R.R. v. United States*, 263 Fed. 578, 579 (1st. Cir., 1920); *City of Kingsville v. Meredith*, 103 F.2d 279, 281 (5th Cir., 1939).

it unqualifiedly to *"any other* structure or *facility necessary or desireable for recreation, public convenience, or safety."* 70 Stat. 708, Ch. 711, 16 U.S.C. §497. If Congress had intended to confine the act's scope only to buildings or structures, it would never have performed the purely futile act of radically altering the law's terminology and of separately specifying that the acreage limit applied without qualification to *"any other facility"* which was either *"necessary or desireable for recreation."* Neither the Court of Appeals nor the Executive have any power to eradicate or limit this plain, clear, and unqualified terminology chosen by Congress.[7]

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[7]The term "facilities" is "a widely inclusive term embracing *anything* which aids or makes easier the performance of the activity involved in the business of a person or corporation," and "is broad enough to include . . . the grounds" adjacent to structures. *Chess v. Widmar*, 635 F.2d. 1310, 1315, note 4 (8th Cir., 1980), *aff'd sub nom. Widmar v. Vincent*, 445 U.S. 263 (1981); *Hartford Electric Light Company v. F.P.C.*, 131 F.2d 953, 961 (2nd. Cir., 1942), *aff'd*, 319 U.S. 61 (1943). This is emphatically not a case in which the breadth of that term may be constricted or nullified under the doctrine of ratification through re-enactment because that principle NEVER APPLIES and no administrative practice is ever adopted "where there are material changes or additions in the later act" or "where the law is plain and clear," both of which factors are here present. "Here there has been an entire rephrasing and restructuring of the statutory provision, a circumstance which always warrants a fresh determination of meaning free of the influences of old decisions, interpretations and administrative practices." *Volkswagen of America, Inc. v. United States*, 340 F. Supp. 983, 989 (Cust. Ct., 1972), *aff'd.* 484 F.2d. 703 (Cust. & Pat. App., 1973); *Biddle v. C.I.R.*, 302 U.S. 573, 583 (1937); 73 *Am. Jur. 2d.* "Statutes" §324, p. 471. Even if Congress had clear notice of a past, dual-permitting practice *and* an intent to continue it—and it did not—the radical restructuring and rephrasing of the 1956 amendment more properly places it within the rule that where "the legislature has responded to (the agency's) past interpretation and administration with severe censure, the general presumption that the agency has correctly discerned and implemented the intent of the legislature, would seem singularly inappropriate" and will not be applied. *Cy Ellis Raw Bar v. District of Columbia Redevelopment Land Agency*, 433 F.2d. 543, 548 (D.C. Cir., 1970); *March v. United States*, 506 F.2d. 1306, 1316-1317 (D.C. Cir., 1974).

Inspite of the broad sweep and plainly unqualified terms of the 1956 amendment's acreage limitation on recreational uses, the Court of Appeals reasons that ski runs are not within its scope because, in a committee report "Congress expressed approval" of the dual permit practice through the committee's statement that "[t]he Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897" and that "[i]ts authority to issue term permits, and the extent to which such authority would be broadened" under the 1915 Act were specified in the amendment. (App. "A", p. 46 quoting in part S. Rep. No. 2511, 84th Cong., 2d. Sess. (1956), p. 1 and H.R. Rep. No. 2792, 84th Cong., 2d. Sess (1956), p. 2.) This statement neither explicitly nor implicitly suggests or permits the construction that the two permits had been or could in the future be combined or that revocable permits could be used for long-term occupancy of the forest reserves and thus does not permit the reading which the Court of Appeals attaches to it. Substantively, the Committee Report's view of the 1897 Act directly conflicts with the Court's interpretation of that Act in the *New Mexico* and *Grimaud* holdings discussed earlier, and we know of no rule of law which permits an intermiediate appellate court to prefer a single, loose sentence in a committee report to this Court's clear precedent. Methodologically too, the Court of Appeals' transformation of a committee report's views of the 1897 Act into judicial precedent which is at odds with the Court's *New Mexico* and *Grimaud* decisions is anathema to the Court's repeated admonition that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance," especially where they are manifested in "a mere statement in a conference committee report." *United States v. Southwestern Cable Company*, 392 U.S. 157, 170 (1968); *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 117-118, note 13 (1980); *United States v. Clark*, 445 U.S. 23, 33, note 9 (1980); *United States v. Wise*, 370 U.S. 405, 414 (1962).

Even if the Court's precedents in the *New Mexico* and *Grimaud* decisions could be ignored, one still could not possibly conclude that in 1956 Congress had notice of or ratified, either expressly or implicitly, the use of revocable permits for ski runs, landing fields, or any long-term, private use of the national forests requiring alteration of natural forest conditions, let alone the combined use of such permits with term permits. This is so because the letter-comments of the Acting Agriculture Secretary included in both the House and Senate Reports on the bill MADE NO REFERENCE WHATSOEVER TO THE COMBINED USE OF TERM AND REVOCABLE PERMITS and thus, like the committee reports themselves, were inherently incapable of giving Congress any notice that it was being asked to ratify any kind of departmental practice. Equally important, as in the late 1940's and early 1930's, the Acting Agriculture Secretary himself claimed no more for the revocable permit authority than that it was applied and used for short-term, temporary occupancy only and functioned only as authority, to quote his letter, "for uses for which long-term tenure is unnecessary or undesirable." In that same letter endorsing the 1956 amendment, the Secretary again represented to Congress that the amendment was essential to permit the use and occupancy of forest lands *"up to 80 acres for such* public and semi-public *uses as landing fields, resorts, camp grounds, picnic areas,* organization camps and *ski lifts,* and to industrial and commercial enterprises," thus placing the very kinds of uses here at issue squarely within the 1956 amendment and completely outside the scope of any claimed, Organic Act revocable permit power. *H.R. Rep. No. 2792,* 84th Cong., 2d. Sess. (1956), p. 3; *S. Rep. No. 2511,* 84th Cong., 2d. Sess. (1956), p. 3 [Letter of Acting Agriculture Secretary True D. Morse.]

Of vital importance here is the cold fact, ignored by the Court of Appeals, that the Department's own examples of long-term land uses cited by the Secretary's 1956 letter-com-

ments as being the kinds of uses for which additional authority was necessary and which would "not exceed 80 acres," are generically identical to ski runs, a fact which vitiates the Court of Appeals' holding. While a ski lift may be a structure, a landing field is not but is often only a dirt strip providing primary or secondary access to some structural or natural source of recreation. Like a ski run, a landing field is an area of land cleared of trees, stumps and rocks by men and machinery which will be used for a period of years, not as a forest, but as a means to the pursuit of some sport or pleasure. A ski run is no different in kind or in its essential land use characteristics from a landing field and is no less a "facility" subject to the 80-acre limit than the landing field specifically cited by the Agriculture Secretary's letter to the 1956 Congress. In view of the plain and unqualified sweep of the 1956 amendment's 80-acre, recreational use limitation, the Secretary's express representations to Congress that land use activities identical to ski runs were long-term uses subject to the 80-acre limitation, and the *complete absence* of anything in the committee reports which would give clear notice to Congress that the Department had in the past and would continue in the future to avoid the acreage limitation through the combined use of revocable and term permits, the Court of Appeals simply exceeded its constitutional authority by effectively repealing the plain, clear, and positively limiting words of 16 U.S.C. § 497.[8]

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[8]Under this Court's *New Mexico* holding the Forest Service possessed absolutely no power other than that conferred in 16 U.S.C. § 497 to manage and use the national forests generally for outdoor recreation until 1960 when Congress enacted the Multiple Use-Sustained Yield Act, 16 U.S.C. § 528, *et seq.* In the *New Mexico* case the Court specifically rejected the Government's contention that the 1960 Multiple Use Act merely confirmed powers which had always existed and held that the 1960 Act was "intended to *expand* the purposes for which the national forests should be administered," 438 U.S. at 713, note 21, thereby creating spheres of authority which had not existed under the Organic Act.

C. *The Court of Appeals' Decision On The Revocability Issue Is At Odds With The Property Clause And Conflicts With A Ninth Circuit Decision And Attorney General Opinions.*

The Court of Appeals simply nullifies the 1956 amendment when it superimposes upon it a fictitious exception for ski runs. The undeniable, physical fact is that the life of a ski run is co-extensive with and equal to that of the ski lift, and the former is no less permanent than the latter. The magnitude of tree stripping, land clearing, or earth moving and grading necessary to create ski runs is at least equal to that required for ski lifts and, in fact, is arguably greater since there are more runs than lifts in skiing facilities. Moreover, a ski run is useless and

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Moreover, the *New Mexico* decision holds that the 1960 Multiple Use Act, while expanding the uses of national forest land to include outdoor recreation, "indicates that recreation, range use, and fish purposes are 'to be supplemental to, but not in derogation of, the purposes for which the national forests were established' under the Organic Administration Act of 1897" and that, as such, recreational uses constitute "secondary purposes" whose scope would not be enlarged by implication "without legislative history to the contrary." 438 U.S. at 714-715. Nothing in the general terms of the Multiple Use Act or its legislative history suggests that it was intended to repeal the clear and positive acreage limitations of 16 U.S.C. § 497, amended only four (4) years earlier, and no such reading of the 1960 Act is legally permissible since "repeals by implication are not favored." *Watt v. Alaska*, 451 U.S. 259, 276 (1981).

In addition, the *New Mexico* decision indicates that the secondary purposes established by the 1960 Multiple Use Act, like outdoor recreation, could not exist where their land use activities were detrimental to the primary purposes of the national forests: water and timber conservation. Stripping of trees for ski slopes is by its nature injurious to both because it promotes erosion and permanently reduces timber acreage. The Fourth Circuit has held that the 1960 Multiple Use Act did not authorize the Forest Service to employ the silviculture technique of "clear-cutting" even though reforestation would recur. *West Virginia Division of Izaak Walton League v. Butz*, 522 F.2d. 945, 953-954 (4th Cir., 1975). The more egregrious activity of stripping all trees without any foreseeable intent to reforest, as in the case of ski slopes, would be ever more forcefully forbidden by both the 1960 and the 1897 Acts.

would not exist but for the ski lifts (and vice-versa), and the simple axiom that skiers who ascend the mountain on ski lifts must descend on the ski runs renders the runs a necessary, essential and primary "facility" as that term is used in 16 U.S.C. § 497 required for the sport of downhill skiing.

Since both ski runs and ski lifts are inseparable parts of a unified land development and are interlocked and interrelated in their nature, the permits which authorize them partake of the same essence; and a so-called revocable permit exceeding 80 acres for ski runs, when linked to a term permit for ski lifts, is in fact a term permit for more than 80 acres regardless of the label given to it. Under these circumstances merely labeling as revocable the 753-acre Special Use Permit for the Snow Bowl's ski runs does not make it so in substance and fact, especially in view of the fact, not questioned by the Court of Appeals, that it is expressly linked in its terms, fee computation schedule and expiration date with the 24-acre Term Permit and, under the Agriculture Department's own regulations, cannot be revoked without a rational basis and administrative review procedures. Being inextricably tied by the nature of its land use (which cannot stand alone), money, improvements and the unitary recreational purpose of the entire ski area development which underlies both permits, the Special Use Permit is secured for precisely the same period of time as the Term Permit inspite of the clear mandate of 16 U.S.C. § 497. To reason otherwise would flout the axiom that "the Court will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem." *Gay v. Parpart*, 106 U.S. (16 Otto) 679, 699 (1883).

As such, the Court of Appeals' decision collides with opinions of the Attorney General and an early Ninth Circuit decision respecting the power to issue and the revocability of the 753-acre Special Use Permit. The Attorney General's Opinions indicate that a permit for the use of government property is revocable and may issue as such only when "however long con-

tinued, *the occupancy is subject* in theory and *in fact to immediate termination at any time at the will of the Government.*" These opinions further hold that "an alienation or what amounts to a transfer or surrender of Government property, by which title, control or possession of the Government is lost reduced, or abridged" may occur only in the manner specified by Congress and not otherwise. 34 *Op. Att'y Gen.* 320, 323, 327-328 (1924); accord, 35 *Op. Att'y Gen.* 485, 489 (1928), emphasis added.

And, in *Osborne v. United States*, 145 F.2d. 892 (9th Cir., 1944) the Ninth Circuit Court of Appeals squarely held that 16 U.S.C. §551 empowers the Forest Service to do no more than to "make and enforce regulations appropriate to the *preservation of natural growth*" in the national forests and that *"the mere authority given the forest service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its land."* The Ninth Circuit stressed that "[n]o grant of United States property may be made except by virtue of Congressional authorization" and then only in the manner specified by Congress, not otherwise. 145 F.2d. at 896, emphasis added, citing *Art. 4, §3, Const.* and *Shannon v. United States*, 160 Fed. 870 (9th Cir., 1908).

The result reached by the Court of Appeals on the revocability issue conflicts with these authorities since the 753-acre Special Use Permit for the Snow Bowl creates a de-facto alienation of national forest land in favor of private developers in a manner NOT authorized by Congress. When linked to the Term Permit, the Special Use Permit exceeds the 80-acre limit of 16 U.S.C. §497 even though it in fact gives the permittee the same security of tenure provided by that statute. By nullifying the plain will of Congress manifested in 16 U.S.C. §497, the Court of Appeals' decision is at odds with the Property Clause, the *Osborne*, *New Mexico* and *Grimaud* holdings and possesses far reaching and substantial implications respecting the disposi-

tion of government land to private entrepeneurs which transcend the land use statutes here at issue and affect the interrelationship of Congress and all Executive Departments in matters of public land disposition.[9] These factors, coupled with the direct conflict between the Court of Appeals' decision and this Court's substantive interpretation of the 1897 Organic Act raise issues of substantial and far-reaching importance which call for this Court to review the issue of the validity of the dual permit practice through its certiorari power.

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[9]Neither the existence of some 200 ski developments, "most" of which employ dual permits nor the fact that the Forest Service has continued to issue dual permits since this Court's *Sierra Club* decision, *supra*, constitutes relevant, persuasive or convincing proof of the validity of the dual permit practice any more than such factors should preclude full review of that issue. This Court has consistently held that *"it matters not what the practice of the department may have been or how long continued"* where the agency's practice is contrary to a statute, here 16 U.S.C. §497, which is "clear and explicit in its language," is "inconsistent with a statutory mandate" or "frustrates the congressional policy underlying a statute." *United States v. Graham*, 110 U.S. 219, 221 (1884); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 746 (1973). Moreover, while the legitimacy of other ski areas has never been questioned, at the Snow Bowl here new permits were issued to a successor corporation while the dual permit issue was under judicial scrutiny. In cases like this the Court has not shyed from full review and a principled decision, notwithstanding the size of investment capital at stake, but has employed its inherent, equitable power to afford full relief to a prevailing plaintiff while staying or applying prospectively its decision to other individual cases where substantial, inequitable results would occur or where the orderly administration of government would be disrupted. *Cipriano v. Houma*, 395 U.S. 701, 706 (1969); *Northern Pipeline Construction Company v. Marathom Pipe Line Company*, U.S. , 102 S.Ct. 2858, 2880 (1982).

Moreover, administrative practice since the Ninth Circuit's dictim in the *Sierra Club* case, *supra*, is irrelevant because this Court has repeatedly held that it "does not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation" of a statute since "the original legislative language speaks louder than such judicial action." *Jones v. Liberty Glass Company*, 332 U.S. 524, 533-544 (1947). Indeed, when Congress ended the Mineral King controversy involved in the *Sierra Club* case by divesting the Forest Service of jurisdiction over the valley and adding it to the Sequoia National Park, Congress specifically prohibited *"the development of permanent facilities for downhill skiing in the area,"* 16 U.S.C. §45f(h), 92 Stat. 3483 (1978), emphasis added, thus employing landguage identical to that containedin 16 U.S.C. §497 so as to proscribe ski runs, lifts, tows, lodges and anything else connected with such developments.

II. THE COURT OF APPEALS' HOLDING THAT THE SAN FRANCISCO PEAKS AS AN ENTITY ARE INELIGIBLE FOR PROTECTION AND LISTING UNDER THE NATIONAL HISTORIC PRESERVATION ACT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND IS CONTRARY TO THE TERMS OF THE ACT, ITS IMPLEMENTING REGULATIONS AND INTERIOR DEPARTMENT PRACTICE.

Section 101a(a)(1)(A) of the National Historic Preservation Act, 16 U.S.C. §470a(a)(1)(A), authorizes the Interior Secretary and him alone, "to expand and maintain a National Register of Historic Places" by listing thereon "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture." The duly promulgated regulations likewise designate the Interior Secretary to be the final arbiter of disputes or questions involving the eligibility of properties for inclusion in the National Register of Historic Places by providing in 36 C.F.R. §800.4(a)(3) that *"if* either the Agency Official or *the State Historic Preservation Officer find that a property meets the National Register Criteria*, or a question exists as to whether a property meets the Criteria, *the Agency Official shall request a determination of eligibility from the Secretary of the Interior"* whose opinion "shall be conclusive." *Accord:* 36 C.F.R. § 63.2(c).

In *Stop H-3 Association v. Coleman*, 533 F.2d. 434 (9th Cir., 1976), *cert. denied sub nom., Wright v. Stop H-3 Association*, 429 U.S. 999 (1976) the Ninth Circuit Court of Appeals enjoined the construction of a highway through the Moanalua Valley in Hawaii and upheld the Interior Secretary's determination that the Valley "may be eligible for inclusion in the National Register" because it "contains Kamanui, the valley of the great power and Waolani, the valley of the spirit which was, in tradition, 'the dwelling place of the gods' " and since "[t]he forests of the valley retain a traditional natural state associated with the legend and history of the area" and "Hawaiian folklore and tradition" which "continues into the 20th century." 533

F.2d. at 436, note 1. The Ninth Circuit further held that under the National Historic Preservation Act "the Interior Secretary is the ONLY official authorized to name properties to the National Register" and that "[t]he regulation [now 36 C.F.R. § 800.4 (a)(3)] expressly and unambiguously provides that 'if it is questionable' whether a property meets National Register Criteria, the responsible agency official *shall request* the Interior Secretary's opinion." 533 F.2d. at 441, 444, emphasis added; *accord: Aluli v. Brown*, 437 F.Supp. 602, 610 (D. Hawaii, 1977) *rev'd on other ground*, 602 F.2d. 876 (9th Cir., 1979) [entire island "might qualify" for listing].

Likewise, in *New Mexico Navajo Ranchers Association v. Interstate Commerce Commission*, 702 F.2d. 227 (D.C. Cir., 1983) a different panel of the Court below, speaking of an area "rich in . . . sites of religious significance to the Navajo," held that the I.C.C. violated the National Historic Preservation Act by failing to defer to the Interior Secretary before it approved construction of a rail line through that area. 702 F.2d. at 232. "Where, as here, a factual question within the primary responsibility of a sister agency [Interior] is relevant to the ICC's determination, the ICC should ordinarily defer by staying its decision pending a determination of the issues by the sister agency and then considering and acting upon that agency's finding." 702 F.2d. at 232-233.

In addition, the record before the Forest Service, the District Court and the Court of Appeals demonstrates without contradiction that the Interior Secretary has consistently listed on the National Register mountains and other properties of a size, geography and significance identical to that which the Arizona State Historic Preservation Officer found the San Francisco Peaks to possess. The Interior Secretary has listed Inyan Kara Mountain in Wyoming's Black Hills National Forest and Bear Butte in South Dakota's Black Hills because these mountains as an entity are "central landmark[s] for Cheyenne [and Sioux] religion" and were "landmark[s] for explorers and travelers" in the area. As recently as 1981 the Interior Secretary also listed

the Helkau District of the Six Rivers National Forest because of its "past ritual use by Native Americans" even though precise geographical delineation of loci or sites of specific significance, which included numerous and diverse "trails, peaks and valleys" was not possible. 'Record, Joint Appendix, Vol. IV, pp. 1245, 1278-79, 1284.) *See* U.S. Department of Interior, National Park Service, *The National Register of Historic Places* (1976 ed.), pp. 704, 867-68.

By holding that the San Francisco Peaks are ineligible for National Register listing, Interior Department review, or the Act's protection, the Court of Appeals' decision here conflicts with the plain terms of the Act, its implementing regulations, settled Interior Department practice, and the decisions of the Ninth Circuit Court of Appeals discussed above. (App. "A", pp. 40-41.) This conflict will result in substantial confusion respecting the meaning, administration and enforcement of the National Historic Preservation Act and will make compliance with it difficult and uncertain. Given this and Congress's declared policy to preserve and protect historically significant properties managed by the federal government in a spirit of stewardship for future generations, 16 U.S.C. §470, §470-1, §470f, we submit that certiorari should be granted to review this important issue.

CONCLUSION

Based upon the foregoing, we submit that this Petition for Writ of Certiorari to the Court below should be granted.

Respectfully submitted,

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[Appendix Separately Printed and Filed]

83-282

No.

OCTOBER TERM, 1983

in the

SUPREME COURT OF THE UNITED STATES

RICHARD F. WILSON and JEAN WILSON,

Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture; R. MAX PETERSON, Chief Forester of the United States and Acting Assistant Secretary of Agriculture for National Resources and Environment, Department of Agriculture; and NORTHLAND RECREATIONS, INC., an Arizona Corporation.

Respondents.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Court of Appeals Opinion
Dated May 20, 1983

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1905

RICHARD F. WILSON, ET AL., APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 81-1912

THE HOPI INDIAN TRIBE, APPELLANT

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 81-1956

NAVAJO MEDICINEMEN'S
ASSOCIATION, ET AL., APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 82-1705

NAVAJO MEDICINEMEN'S
ASSOCIATION, ET AL., APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 82-1706

THE HOPI INDIAN TRIBE, APPELLANT

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 82-1725

RICHARD F. WILSON and JEAN WILSON,
husband and wife, APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 81-00558, 81-00481 & 81-00493)

Argued October 15, 1982

Decided May 20, 1983

John Paul Kennedy, with whom *David B. Lee* was on the brief, for Hopi Indian Tribe, appellant in 81-1912 and 82-1706. *C. Benson Hufford*, also entered an appearance for appellant, in 81-1912. *Richard M. Hymas*, also entered an appearance for appellant in 82-1705, 82-1706 and 82-1725.

John A. MacKinnon, with whom *Elizabeth Bernstein* and *C. Benson Hufford* were on the brief, for Navajo Medicinemen's Association, et al., appellants in 81-1956 and 82-1705. *Daniel S. Press*, also entered an appearance for appellants in 81-1956. *C. Benson Hufford*, also entered an appearance for appellants in 82-1725.

Charles R. Work, with whom *Robert W. Warden*, *Douglas J. Wall*, *John A. Hodges*, and *Robert A. Warden*, were on the brief, for Richard F. Wilson and Jean Wilson, appellants in 81-1905 and 82-1725, and *amici curiae* in 81-1912, 81-1956 and 82-1706.

Jacques B. Gelin, Attorney, Department of Justice, with whom *Patricia J. Beneke* and *Robert L. Klarquist*, Attorneys, Department of Justice, were on the brief, for appellees. *Robert D. Clark*, Attorney, Department of Justice, also entered an appearance for appellees in 81-1905, 81-1912 and 81-1956.

Richard McCune Shannon and *Stephen P. Kling* were on the brief for appellee, Northland Recreation Inc.

Ellen Leitzer was on the brief, for Eastern Bank of Cherokee Indians, et al., *amici curiae* urging reversal in 81-1905, 81-1912 and 81-1956.

Before: TAMM and GINSBURG, *Circuit Judges*, and LUMBARD,* *Senior Circuit Judge*, United States Court of Appeals for the Second Circuit.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Senior Circuit Judge* LUMBARD.

LUMBARD, *Circuit Judge*: These appeals challenge the grant of summary judgment by the District Court for the District of Columbia which affirmed the decisions of the Forest Service and the Department of Agriculture to permit private interests to expand and develop the government-owned Snow Bowl ski area on the San Francisco Peaks in the Coconino National Forest just north of Flagstaff, Arizona. The appeals are brought by the Hopi Indian Tribe, the Navajo Medicinemen's Association and other Navajos, and Richard F. Wilson, et al. each of whom filed separate suits which were consolidated for trial by Judge Richey. We affirm.

The Navajo and Hopi Indian tribes are federally recognized tribes of American Indians. The Hopi reservation and most of the Navajo reservation are located in northeastern Arizona and encompass a total area of 25,000 square miles. Approximately 9,000 Hopis and 160,000 Navajos reside on the reservations.

The dominant geological formation visible from the Hopi villages and much of the western Navajo reservation is the San Francisco Peaks. The Peaks, which rise to a height of 12,633 feet, have for centuries played a central role in the religions of the two tribes. The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks.

They believe that artificial development of the Peaks would impair the Peaks' healing power.

The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as "Kachinas." The Hopis believe that for about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.

The San Francisco Peaks are within the Coconino National Forest and are managed by the Forest Service. A 777 acre portion of the Peaks, known as the "Snow Bowl," has been used for downhill skiing since 1937 when the Forest Service built a road and ski lodge. The lodge was destroyed by fire in 1952 and was replaced in 1956. Ski lifts were built at the Snow Bowl in 1958 and 1962. Since 1962 the facilities have changed very little.

In April 1977 the Forest Service transferred the permit to operate the Snow Bowl skiing facilities from Summit Properties, Inc. to the Northland Recreation Company. In July 1977 Northland submitted to the Forest Service a "master plan" for the future development of the Snow Bowl, which contemplated the construction of additional parking and ski slopes, new lodge facilities, and ski lifts. The Forest Service, pursuant to the National Environmental Policy Act, conducted public workshops and solicited alternatives to Northland's plan. The Forest

Service evaluated the proposed alternatives and identified six which were feasible and represented the spectrum of public opinion. These alternatives ranged from complete elimination of artificial structures in the Snow Bowl to full development as proposed by Northland. On June 23, 1978 the Forest Service filed a draft Environmental Impact Statement evaluating the six alternatives. Between June 23 and September 30, 1978 the Forest Service solicited public opinion on the draft Environmental Impact Statement. Special efforts were made to solicit the views of the Hopis and Navajos.

On February 27, 1979 the Forest Supervisor of the Coconino National Forest issued his decision to permit moderate development of the Snow Bowl under a "Preferred Alternative," which in fact was not one of the six alternatives previously identified. The Preferred Alternative envisions the clearing of 50 acres of forest for new ski runs, instead of the 120 acres requested by Northland. The Preferred Alternative also authorized construction of a new day lodge, improvement of restroom facilities, reconstruction of existing chair lifts, construction of three new lifts, and the paving and widening of the Snow Bowl road.

At the request of various persons, including certain of the plaintiffs, the Regional Forester on February 7, 1980 overruled the Forest Supervisor and ordered maintenance of the status quo. The Chief Forester on December 31, 1980 reversed the Regional Forester and reinstated the Forest Supervisor's approval of the Preferred Alternative.

On March 2, 1981, the Navajo Medicinemen's Association filed suit in the District Court for the District of Columbia, naming as defendants John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the Forest Service; the Forest Service; and the United States. The complaint sought a halt to further development of the Snow Bowl and the removal of existing ski facilities. This suit was consolidated with similar suits brought by the Hopi tribe and Jean and Richard

Wilson, owners of a ranch located a mile and a half below the Snow Bowl.

The plaintiffs alleged that expansion of the Snow Bowl facilities would violate the Indians' First Amendment right to the free exercise of religion, the American Indian Religious Freedom Act, the fiduciary duties owed the Indians by the government, the Endangered Species Act, two statutes regulating private use of national forest land (16 U.S.C. §§ 497, 551), the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, and the Administrative Procedure Act.

Pursuant to expedited procedures agreed to by all the parties, numerous affidavits were submitted together with a Joint Stipulation of Material Facts. The parties filed cross-motions for summary judgment. While these motions were pending the district court on May 27, 1981 permitted Northland to intervene as a defendant. After a hearing, Judge Richey on June 15, 1981 granted summary judgment to the defendants on all issues except the plaintiffs' claim under the National Historic Preservation Act. Finding that the Forest Service had failed to comply with certain requirements of that Act, Judge Richey remanded the cause to the Forest Service for further proceedings and stayed development until compliance. After the defendants reported back, Judge Richey on May 14, 1982 ruled that the Forest Service had achieved compliance and he entered final judgment for the defendants on all issues and vacated his stay. These appeals followed promptly and the defendants have agreed to delay development pending their disposition.

From our review of the record we are convinced that Judge Richey's conclusions of law are in accordance with precedent and not in error. Accordingly, we affirm the judgments. Our opinion considers in detail the claims raised by the plaintiffs under the following constitutional provisions and statutes: the Free Exercise Clause, the American Indian Religious Free-

dom Act, the Establishment Clause, the Endangered Species Act, the Wilderness Act, the National Historic Preservation Act, and 16 U.S.C. §§ 497, 551.

1. *Free Exercise of Religion.*

Religious freedom is guaranteed by the First Amendment, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Navajo and Hopi plaintiffs contend that development of the Snow Bowl is inconsistent with their First Amendment right freely to hold and practice their religious beliefs.[1] Believing the San Francisco Peaks to be sacred, they feel that development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes. They contend that development would seriously impair their ability to pray and conduct ceremonies upon the Peaks, and to gather from the Peaks the sacred objects, such as fir boughs and eaglets, which are necessary to their religious practices. As relief, the Navajos and Hopis seek a phased removal of all artificial structures on the Peaks, or, at the least, an injunction against further development of the Snow Bowl. Judge Richey, although he recognized the sincerity of the plaintiffs' beliefs, held that a First Amendment claim had not been stated. He found that the government had not denied the Indians access to the Peaks or impaired their ability to gather sacred objects and conduct ceremonies, and thus had not burdened their beliefs or religious practices. We agree with Judge Richey that the plaintiffs have not shown an impermissible burden on religion.

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[1]Judge Richey properly ruled that Jean and Richard Wilson, who are not Indians, did not have standing to assert the Navajo and Hopi religious claims. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 114 (1976). We have, however, considered the Wilsons' briefs on the religious claims as briefs of *amicus curiae*.

To be protected by the Free Exercise Clause of the First Amendment, a belief or practice must be "rooted in religion." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 713 (1981). The parties have stipulated that the plaintiffs' beliefs are religious and are sincerely held, and the record contains abundant evidence supporting that stipulation. We therefore proceed directly to apply the Free Exercise Clause to the plaintiffs' claims and the proof before us.

The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner. *See, e.g., Badoni v. Higginson*, 638 F.2d 172, 176-77 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969). The initial burden of proof in free exercise cases is upon the plaintiff to demonstrate a burden upon religion. *See School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963). Only if a burden is proven does it become necessary to consider whether the governmental interest served is compelling, or whether the government has adopted the least burdensome method of achieving its goal. In analyzing the plaintiff's contentions that the ski resort expansion will burden their religions, we consider separately the effects of development upon their beliefs and upon their religious practices.

The plaintiffs stress that development of the Snow Bowl for a ski resort is grossly inconsistent with their beliefs. The Hopis and the Navajos believe that they owe a duty to the deities to maintain the San Francisco Peaks in their natural state. They believe that breach of that duty will lead to serious adverse consequences for their peoples. Navajo and Hopi religious practitioners are deeply troubled by the development that

has already occurred upon the Peaks, and expansion of the Snow Bowl will increase their disquiet.[2]

The First Amendment right to hold religious beliefs is absolute. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Notwithstanding the plaintiffs' concerns, it is clear that the government has not regulated, prohibited, or rewarded their religious beliefs as such, nor has it in any manner directly burdened the plaintiffs in their beliefs. The Free Exercise Clause, however, also proscribes certain *indirect* burdens on belief. Arguing that an impermissible indirect burden has been imposed, the plaintiffs direct our attention to *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board of the Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).

In *Sherbert*, the plaintiff, a Seventh-Day Adventist, was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her faith. The South Carolina Employment Security Commission refused the plaintiff's application for unemployment benefits, finding that her religious convictions did not constitute "good cause" for refusing available work. The South Carolina Supreme Court upheld the

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[2]The plaintiffs claim that further development of the Snow Bowl could have a serious and adverse impact upon their tribes' cultures and social organization. Abbott Sekaquaptewa, then-chairman of the Hopi tribe, stated in "Narrative Direct Testimony" submitted to the district court:

> It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture.

Commission's determination. The Supreme Court reversed. The fact that no criminal sanctions compelled the plaintiff to violate her beliefs, said the Court, did not end the free exercise inquiry. Instead, held the Court, the government burdens the free exercise of religion when it conditions receipt of a government benefit, such as unemployment compensation, on conduct inconsistent with the recipient's religious beliefs. In *Thomas*, the plaintiff, a Jehovah's Witness, quit his job at a factory producing tank turrets because he believed armaments production to be inconsistent with his faith. The Indiana Supreme Court held that the plaintiff's decision to quit employment because of his religious convictions did not constitute "good cause" and denied him unemployment benefits. The Supreme Court reversed, holding, as it did in *Sherbert*, that the government burdens free exercise when it forces an individual to choose between a government benefit and fidelity to religious belief. The Court stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18.

Sherbert and *Thomas* are not factually analogous to the present case. The government here has not conditioned any benefit upon conduct proscribed or mandated by the plaintiffs' beliefs. Acknowledging this factual distinction, the plaintiffs read *Sherbert* and *Thomas* broadly as condemning under the Free Exercise Clause governmental actions which strongly, if indirectly, encourage religious practitioners to modify their beliefs. Specifically, the plaintiffs argue that governmental

actions which "desecrate and destory the spiritual character of a religion's most sacred shrine" and which may thereby force practitioners "to fundamentally modify their religious doctrine to conform to the changed circumstance" create free exercise burdens under *Sherbert* and *Thomas*. We disagree. *Sherbert* and *Thomas* hold only that the government may not, by conditioning benefits, penalize adherence to religious belief. Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion. The Secretary of Agriculture has a statutory duty, *see, e.g.*, 16 U.S.C. §§ 471, 528 (1976) to manage the National Forests in the public interest, and he has determined that the public interest would best be served by expansion of the Snow Bowl ski area. In making that determination, the Secretary has not directly or indirectly penalized the plaintiffs for their beliefs. The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim under *Sherbert*, *Thomas*, or any other authority.[3] In sum, the plaintiffs have not shown that expansion of the Snow Bowl will burden their freedom to believe. A separate question, to which we now turn, is whether expansion will burden the plaintiffs in the practice of their religions.

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[3]*Pillar of Fire v. Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973), is not to the contrary. In *Pillar of Fire*, the plaintiff church sought to enjoin the condemnation by an urban renewal project of its first permanent church building. The plaintiff alleged that its members revered the building for its historical and symbolic meaning in the birth of their sect. The Colorado Supreme Court held that the plaintiff was entitled to a court hearing at which its interests could be weighed against those of the renewal authority. "(R)eligious faith and tradition," said the court, "can invest certain structures and land sites with significance which deserves First Amendment protection." 181 Colo. at 419, 509 P.2d at 1254. A governmental taking of privately-owned religious property, however, involves different considerations than does a claimed First Amendment right to restrict the government's use of its own land.

The plaintiffs must have access to the San Francisco Peaks to practice their religions. Certain of the plaintiffs' ceremonies must be performed upon the Peaks and religious objects must be collected there. Because the plaintiffs' religions are, in this sense, site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects. The plaintiffs claim that the Preferred Alternative will impair their religious practices in precisely that manner. Few courts have considered whether the Free Exercise Clause prohibits the government from permitting land uses that impair specific religious practices. Of the cases which have considered this problem, we find *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), to be particularly instructive.

In *Sequoyah*, a class action brought on behalf of practitioners of the Cherokee religion, the plaintiffs sought to halt construction of the Tellico Dam on the Little Tennessee River. The plaintiffs alleged that the dam, when completed, would flood the Cherokee "sacred homeland" along the river, and would destory "sacred sites, medicine gathering sites, holy places and cemeteries," and "disturb the sacred balance of the land." 620 F-2d at 1160. The Sixth Circuit affirmed a grant of summary judgment to the defendant, ruling that the plaintiffs, to establish a burden of free exercise, had to prove that the valley to be flooded was indispensable or central to their ceremonies and practices. The plaintiffs' proof was insufficient, held the court, as the evidence indicated that medicines obtainable in the valley could be obtained elsewhere, and that the flooding would not prevent the plaintiffs from engaging in any particular religious observances.[4]

[4]Four cases in addition to *Sequoyah* have considered free exercise claims seeking to restrict development of government land. In *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954

Judge Richey relied upon the *Sequoyah* analysis in the present case, and held that the plaintiffs had failed to show the indispensability of the Snow Bowl to the practice of their religions. The plaintiffs challenge Judge Richey's reliance upon *Sequoyah* on two grounds. They argue first that *Sherbert* and *Thomas*, and not *Sequoyah*, establish the standard applicable to

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(1981), Navajo religious practitioners believed that the Rainbow natural bridge, a great arch of sandstone located in the Rainbow Bridge National Monument in Utah, was sacred. They complained that a government reservoir which had partially inundated the bridge had covered some of their gods and prayer sites, and that the noisy tourists who visited the bridge desecrated the site and made ceremonies impractical. As relief, the plaintiffs requested the court to order the government to lower the reservoir, to issue regulations controlling tourist behavior, and on appropriate notice, to close the monument to tourists so that ceremonies could be conducted. The Tenth Circuit affirmed a district court decision denying relief. The Tenth Circuit held that the government had a compelling interest in filling the reservoir that out weighed any First Amendment right the plaintiffs might assert, and that closing the Monument, or restricting tourist behavior, to accommodate the plaintiffs' beliefs would violate the Establishment Clause. Ruling as it did, the Tenth Circuit never considered in detail whether the Free Exercise Clause can create a right to restrict government land use. The decision in *Badoni* therefore offers little guidance here. In *Crow v. Gullet*, 541 F.Supp. 785 (D.S.D. 1982), a class action on behalf of the Lakota and Tsistsistas nations, and Lakota and Tsistsistas religious practitioners, the plaintiffs objected to certain construction projects and park regulations at the Bear Butte State Park in South Dakota. The plaintiffs alleged, *inter alia*, that Bear Butte was a significant site in their religions that would be desecrated by the access roads, parking lot, and viewing platforms that the state had built or was planning to build. The district court denied relief, holding that "the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out." 541 F. Supp. at 791. It is uncertain, however, whether the court believed that the Free Exercise Clause can *never* restrict government land use, since the court specifically noted that the plaintiffs had "failed to establish that particular religious practices were damaged by the construction." *Id.* In *Inupiat Community of Artic Slope v. United States*, 548 F. Supp. 182, 188-89 (D. Alaska 1982), the Inupiat people of Alaska brought suit to quiet title to portions of the Beaufort and Chukchi Seas in which the United States had issued oil leases. The plaintiffs claimed, *inter alia*, that development would burden their right freely to practice their religion. The court

to their claim. They contend that governmental action which indirectly imposes a burden upon religious practice greater than the burdens involved in *Sherbert* and *Thomas* necessarily violates the First Amendment. Contending that the Snow Bowl ski area effectively prohibits the practice of their religions, the plaintiffs claim that their burden is greater than that of the practitioners in *Sherbert* and *Thomas*, who, the plaintiffs say, could have continued to practice their beliefs simply by choosing to forego government benefits. However, as we previously stated, Sherbert and Thomas considered only whether the government may legally condition benefits on a decision to forego or to adhere to religious belief or practice. Those cases did not purport to create a benchmark against which to test all indirect burden claims. Second, the plaintiffs argue that *Sequoyah* incorrectly interpreted the First Amendment. They argue that the First Amendment protects all religious practices, whether or not "central," and that courts are not competent to rule upon the centrality of religious belief or practice. We agree that the First Amendment protection of religion "does not turn on the theological importance of the disputed activity," *Unitarian Church West v. McConnell*, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972), *affd.*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other grounds*, 416 U.S. 932 (1974) and that courts may not "dictate which practices are or are not required in a particular religion." *Geller v. Secretary of Defense*, 423 F. Supp. 16, 17 (D.D.C. 1976). *See Thomas*, 450 U.S. at 715-16;

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rejected the plaintiffs' claim, finding that the plaintiffs had failed to show impairment of their religious practices, that the government had a compelling interest in developing energy resources, and that the Establishment Clause in any event barred relief. Finally, in *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 552 F. Sup. 951 (N.D. Calif. 1982), the plaintiffs, claiming that their religious activities would be disrupted, sought to enjoin the Forest Service from approving construction of a road upon land sacred to several Northwest Indian tribes. The court held for the defendants, and stated that the First Amendment does not obligate the government "to control or limit public access to public lands in order to facilitate" religious practices. 552 F. Supp. at 954.

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-20 (1976). These principles, however, are not contrary to *Sequoyah's* analysis. Far from requiring judicial evaluation of religious doctrine, *Sequoyah* focuses inquiry solely upon the importance of the geographic site in question to the practice of the plaintiffs' religion. If the plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim. We agree with *Sequoyah's* resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion. We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.[5]

[5]We do not hold that such proof necessarily would establish a burden on free exercise. Instead, we hold only that the First Amendment requires, at a minimum, proof that the religious practice could not be performed at any site other than that to be developed. Because we agree with Judge Richey that the plaintiffs have not satisfied this minimum burden of proof, we need not consider what, if any, additional factors are necessary to establish a free exercise burden. At the same time, we decline to follow those cases which have placed primary reliance upon the government's property interest and which have held, apparently, that the Free Exercise Clause can never supersede the government's ownership rights and duties of public management. *See Crow v. Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1982); *Northwest Indian Protective Cemetery Assoc. v. Peterson*, 552 F. Supp. 951, 954 (N.D. Calif. 1982). The government must manage its land in accordance with the constitution, *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980), *cert. denied*, 449 U.S. 935 (1980), which nowhere suggests that the Free Exercise Clause is inapplicable to government land. This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis. In holding that government land uses can never burden the right to freedom of belief, and can burden the right to freedom of practice only if site-specific religious practices are

The plaintiffs argue that their proof establishes a denial of First Amendment rights even under the above standard. They rely principally upon the affidavits submitted by Hopi and Navajo religious practitioners, which establish that ceremonies conducted upon the Peaks are indispensable to the plaintiffs' religions; that ceremonial objects must be collected from the Peaks to be effective; that some ceremonial objects and medicinal herbs are collected from the Snow Bowl, and that expansion of the ski area could make those objects and herbs more difficult to find; that ceremonies and prayers have occasionally been conducted in the Snow Bowl, but that expansion of the ski area will destroy the natural conditions necessary for prayers and ceremonies to be effective; and that the mountain as a whole, and not just parts thereof, is considered sacred.

The plaintiffs' affidavits, together with other evidence in the record, establish the indispensability of the Peaks to the practice of the plaintiffs' religions. The Forest Service, however, has not denied the plaintiffs access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does not show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The plaintiffs have not proven that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else. The record evidence is, in fact, to the contrary. The Forest Service's Final Environmental Statement found, on the basis of comments submitted by Hopi and Navajo practitioners, that "religious practices, including collecting plant materials, may occur in many locations on the sacred mountain." The government submitted affidavits from two experts on Hopi and Navajo religion. One expert stated

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significantly impaired, we pay due regard to the government's rights and duties in its land. However, we see no basis for completely exempting government land use from the Free Exercise Clause.

that expansion of the Snow Bowl should have little "direct" impact on the plaintiffs' religious practices; the other stated with respect to Hopi practices that "(g)uarantee of access to the mountain should permit the continuation of all essential ritual practices," and with respect to Navajo practices that "(n)o ceremonial items . . . are found only in the permit area." It must be remembered that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the plaintiffs from practicing their religions.[6] Judge Richey found that "the Snow Bowl operation has been in existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have managed to coexist with the diverse developments that have occurred there." (footnote omitted). The plaintiffs simply have not demonstrated that development will prevent them from engaging in any religious practices.[7]

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[6]Among the structures currently on the Peaks are natural gas, telephone, and electric transmission lines, water tanks for stock, unpaved roads, and the present Snow Bowl ski resort. Cinder extraction and mining have been conducted on the Peaks for at least the past 30 years.

[7]The plaintiffs urge that Judge Richey erred in granting the defendants summary judgment because material issues of fact were in dispute. They argue that when Judge Richey granted summary judgment the parties still disputed the effect development would have upon the plaintiffs' religions. We conclude, however, that in light of the case's procedural posture judgment was properly granted. On May 20, 1981, the parties filed with the district court a Joint Stipulation of Material Facts (supplemented on June 1, 1981). Although the stipulated facts did not dispose of one crucial factual issue—the indispensability of the permit area to the practice of the plaintiffs' religions—they did establish many of the principal facts underlying the plaintiffs' claim. The parties supplemented the stipulated facts with numerous affidavits concerning the religious significance of the Snow Bowl. The parties filed with their affidavits cross-motions for summary judgment which were argued before Judge Richey. When Judge Richey asked counsel for the Hopis whether the plaintiffs had "any reservations about the Court deciding this on the merits by virtue of stipulation and the affidavits," he replied, "Not at all, Your Honor." We thus find that the plaintiffs agreed to the disposition

As the plaintiffs have not shown that development will burden them in their religious beliefs or practices, we need not decide whether the ski area expansion is a compelling governmental interest, or whether the Preferred Alternative is the least restrictive means of achieving that interest.

2. *American Indian Religious Freedom Act.*

The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. IV 1980) (AIRFA), provides:

> On and after August 11, 1978 it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The plaintiffs contend that AIRFA proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling

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of this claim on the written record. As the Ninth Circuit stated in *Gillespie v. Norris*, 231 F.2d 881, 883-84 (9th Cir. 1956):

> Now, while summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned, there is no reason why parties cannot agree to try a case upon affidavits, admissions and agreed documents. In effect, that is what was done here. No objection whatever was made at the time of submission that there were questions of fact which could not be decided upon the evidence before the trial court.

Accord, Starsky v. Williams, 512 F.2d 109, 111-13 (9th Cir. 1975). Upon his review of the written record, Judge Richey found that the plaintiffs had not "shown that the permit area of the San Francisco Peaks is central or indispensable to their religion." This finding is not clearly erroneous and, indeed, is not significantly refuted by any evidence in record. We must emphasize that evidence that all of San Francisco Peaks, including the Snow Bowl, is sacred, does not establish the indispensability of the permit area.

governmental interests. They argue that the Snow Bowl ski resort expansion is not a compelling governmental interest, and is accordingly proscribed by AIRFA. Judge Richey refused to give AIRFA the broad reading urged by plaintiffs. He found that AIRFA requires federal agencies to evaluate their policies and procedures with the aim of protecting Indian religious freedom, to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies, and to consult with Indian organizations in regard to proposed actions, but that AIRFA does not require "Native traditional religious considerations always [to] prevail to the exclusion of all else." We agree. Judge Richey's interpretation of AIRFA[8] is fully supported by the legislative history, and the record supports his finding of Forest Service compliance.

AIRFA affirms the protection and preservation of traditional Indian religions as a policy of the United States, but the statutory language does not indicate the extent to which Congress intended that policy to override other land use considerations. We therefore look for guidance to the legislative history, and, in particular, to the substantially identical committee reports prepared by the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs. These reports reveal that in AIRFA Congress addressed the unwarranted and often unintended intrusions upon Indian religious practices resulting from federal officials' ignorance and the inflexible enforcement of laws and regulations which, though intended to achieve valid secular goals, had directly affected Indian religious practices. The reports identify three areas of concern: (1) denial of access to religious sites; (2) restrictions on the possession of such substances as peyote; and

[8]Judge Richey's decision marked the first judicial interpretation of AIRFA. Courts in only two other circuits have since construed AIRFA, and both followed Judge Richey's interpretation. *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 552 F. Supp. 951, 954 (N.D. Calif. 1982); *Crow v. Gullett*, 541 F. Supp. 785, 793-94 (D.S.D. 1982).

(3) actual interference with religious events. The federal government, the reports note, had sometimes denied Indians access to religious sites on federal land; had failed to accommodate such federal statutes as the drug and endangered species laws to the Indians' religious needs, and had itself interfered, or permitted others to interfere, with religious observances. *See* S. Rep. No. 709, 95th Cong., 2d Sess. 2-4; H.R. Rep. No. 1308, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262, 1263-64. Thus, the House Report stated that the purpose of AIRFA is "to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." H.R. Rep. No. 1308, *supra*, at 1, 1978 U.S. Code Cong. & Ad. News at 1262.

It is clear from the reports, and from the statutory preamble, that AIRFA requires federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices. Agencies must evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices. AIRFA does not, however, declare the protection of Indian religious practitioners a veto on agency action. "The clear intent of [AIRFA]," the Senate report states, "is to insure for traditional native religions the same rights of free exercise enjoyed by more powerful religions. However, it is in no way intended to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. Government treats them equally." S. Rep. No. 709, *supra*, at 6. The comments made during debate by Representative Udall of Arizona, the chairman of the Interior and Insular Affairs Committee and the sponsor of the House bill, similarly indicate that AIFA does not supersede the many

laws under which federal lands are managed for the public good. Representative Udall stated:

> Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians.
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> * * * *
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> Mr. Speaker, I have received a letter from Assistant Attorney General Patricia M. Wald which . . . states that it is the Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. That, of course, is the committee's understanding and intent.

124 Cong. Rec. 21,444 (1978).

> All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not.
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> * * * *
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> (The resolution) simply says to our managers of public lands that they ought to be encouraged to use these places. It has no teeth in it. It is the sense of the Congress.

Id. at 21,445.

Thus AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices. This court's recent decision in *New Mexico*

Navajo Ranchers Assoc. v. ICC, (D.C. Cir. Slip Op. March 1, 1983) (per curiam), indicates that agencies will not be permitted to ignore their AIRFA duties. There, this court remanded for further consideration the ICC's approval of a rail line to be built across northwestern New Mexico because the ICC had failed properly to consider, *inter alia*, evidence that the railroad permittee would not fulfill its promise to protect Navajo sacred sites along the right-of-way.

Finally, we find that the Forest Service complied with AIRFA in the present case. Before approving the Preferred Alternative the Forest Service held many meetings with Indian religious practitioners and conducted public hearings on the Hopi and Navajo reservations at which practitioners testified. The views there expressed were discussed at length in the Final Environmental Statement and were given due consideration in the evaluation of the alternative development schemes proposed for the Snow Bowl. Development of the Snow Bowl under the Preferred Alternative will not deny the plaintiffs access to the Peaks, nor will it prevent them from collecting religious objects. The Forest Service has not burdened the plaintiffs' religious practices in any manner prohibited by AIRFA.

3. *Establishment Clause.*

Judge Richey held that to grant the plaintiffs the relief they request would violate the Establishment Clause of the First Amendment. We think it unnecessary to reach that issue. As neither the Free Exercise Clause nor AIRFA entitles the plaintiffs to relief, we have no reason to consider whether relief is barred by a separate constitutional provision. We note, moreover, that where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 & 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

4. *Endangered Species Act.*

The plaintiffs claim that the Forest Service violated section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536 (a)(2) (Supp. IV. 1980), by failing to insure that the Preferred Alternative will not be likely to jeopardize the continued existence on the Peaks of a small yellow-flowered plant called *senecio franciscanus*, or the "San Francisco Peaks groundsel." *Senecio franciscanus* exists only in an elongated area of approximately 2.6 square kilometers at the top of the Peaks. This elongated area extends into the Snow Bowl permit area. As an alpine plant, *senecio franciscanus* is particularly susceptible to damage from human activity. The plant's population, once reduced by human activity, would not recover for decades or even centuries. The approved development will extend into a small portion of the plant's habitat and will destory a small number of the plants. The greatest threat to the plant's continued existence, however, is posed not by construction, or by skiers, but by summer hikers who walk off-trail and trample the fragile plants. Expansion of the ski lifts will significantly increase the threat to the plant by allowing a greater number of hikers to reach its habitat.

On June 16, 1976 the Secretary of the Interior proposed *senecio franciscanus* for formal listing as an endangered species under section 4 of the Endangered Species Act of 1973, 16 U.S.C. § 1533. Section 4 requires the Secretary to publish in the Federal Register a list of those species determined by him or by the Secretary of Commerce to be endangered or threatened within the meaning of the Act. The Endangered Species Act amendments of 1978 required the withdrawal of all listing proposals over two years old. A one year grace period was extended to proposals already over two years old. On December 10, 1979 the Secretary withdrew the proposal to list *senecio franciscanus* because no action had been taken on the proposal since its submission. At the time the plaintiffs commenced this suit *senecio franciscanus* was neither listed nor proposed for listing.

Section 7(a)(2) of the Endangered Species Act requires each federal agency, with the assistance of the Secretary, to insure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species. Section 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Section 7(a)(2) requires an agency, prior to project implementation, formally to consult the Secretary about any agency action that might affect a protected species. Section 7(b), 16 U.S.C. § 1536(b), requires the Secretary to provide to an agency that consults him under section 7(a)(2) a written opinion indicating how the agency's proposed action would affect the protected species and identifying means of protecting the species. The Forest Service has not formally consulted the Secretary about *senecio franciscanus*, and it has not obtained the written opinion required by section 7(b). The plaintiffs' claim would therefore have merit if section 7(a)(2) in fact protected *senecio franciscanus*. We, however, agree with Judge Richey, who held that § 7(a)(2) applies only to species listed pursuant to section 4, and hence had no application to the unlisted *senecio franciscanus*.

To support their argument that § 7(a)(2) protects all endangered or threatened species, whether or not listed, the plaintiffs make four principal points. First, they point out that § 7(a)(2) refers to "*any* endangered species or threatened

species," (emphasis supplied), and does not, unlike many other sections of Act, *see, e.g.*, § § 7(a)(1), (c)(1), 16 U.S.C. § § 1536 (a)(1), (c)(1), specifically refer to species which are "listed" or "proposed to be listed." Second, they note that § 7a(2)'s reference to "endangered . . . or threatened species" does not incorporate a listing requirement because the statutory definitions of "endangered species" and "threatened species" do not mention listing.[9] Third, they draw attention to the difference between the 1973 and the 1978 versions of section 7. As enacted in 1973, section 7 in a single clause required federal agencies to carry out "programs for the conservation of *endangered species and threatened species listed pursuant to section 1533*" and to insure that agency actions did not jeopardize the continued existence "of *such* endangered species and threatened species." (emphasis supplied). The 1978 amendments to the Endangered Species Act divided that clause into two sentences. In the first sentence Congress again required agencies to conduct programs for the preservation of "listed" species, and in the second sentence again required agencies to insure the continued existence of endangered and threatened species. However, the amended section 7, in contrast to the original, did not, in restricting agency action, directly or indirectly refer to "listed" species. Instead, the 1978 amendments changed the word "such" in the original statute to "any" and required agencies to insure the existence of "any endangered species or threatened species." Finally, the plaintiffs note that in 1979 both houses of Congress considered proposed amendments to the Act which, *inter alia*, would have added an explicit listing requirement to § 7(a)(2). *See* S. 1143, 96th Cong., 1st Sess. § 6(a) (1979), 125 Cong.

[9] 16 U.S.C. § 1532(6) defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range other than [certain insects]." 16 U.S.C. § 1536(20) defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

Rec. S7557 (daily ed. October 24, 1979). Although Congress did amend the Endangered Species Act in 1979, it did not amend § 7(a)(2) to include a specific listing requirement.

The plaintiffs claim that their points prove that Congress intended the 1978 amendments to extend § 7 protection to unlisted species.[10] The legislative history, however, strongly indicates that Congress had no such intent. In its report on the 1978 amendments, the House Committee on Merchant Marine and Fisheries stated:

> The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened."

H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 9453, 9455. The House report further states: "The mandate of section 7 applies once a species is listed." *Id.*, at 7, 1978 U.S. Code Cong. & Ad. News at 9458. These statements, it is true, are contained in a section of the committee report that summarizes the operation of the 1973 Act, and thus are not direct evidence of Congress' intent regarding the 1978 amendments. That portion of the committee report which does discuss the effect of the 1978 amendments, *see Id.* at 19-25, 1978 U.S. Code Cong. & Ad. News at 9469-75, however, contains no indication that in amending section 7 Congress intended to broaden its coverage to protect species not protected by the 1973 Act. Instead, Congress principally

[10] The plaintiffs' final point—Congress' failure in 1979 to amend § 7(a)(2) to refer specifically to listed or proposed species—adds little to their argument. Congress in 1979 clearly believed that § 7(a)(2) applied only to listed species. *See* the discussion *infra*. Thus the proposed amendments to § 7(a)(2) were intended not to *add* a listing requirement, but to extend § 7 protection, for the first time, to species only *proposed* for listing. Although Congress did not amend § 7(a)(2) in this respect, it did protect proposed species by adding § 7(a)(3) to the Act. *See* H.R. Cong. Rep. No. 697, 96th Cong., 1st Sess. 13, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2576.

intended in amending section 7 to define procedures that would facilitate agency compliance with the section and to establish a mechanism by which agencies could, in appropriate cases, be exempted from the section. Comments made in connection with the 1979 amendments are also significant. The Committee on Merchant Marine and Fisheries states in its report on the 1979 amendments: "The mandate of section 7 applies once a species is listed or once 'critical habitat' is designated for any listed species." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2557, 2561 (1979). The House Conference Report on the amendments states:

> The conferees note that the purpose of a listing proposal is to determine whether a species is endangered or threatened and should be listed as such. The protections of Section 7 should not apply until a species has been formally listed.

H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 13, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2577. We are aware that subsequent legislative history is not controlling evidence of the intent underlying previously enacted legislation. *See Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). Nonetheless, we think that the 1979 committee and conference reports are entitled to significant weight in interpreting the effect of the 1978 amendment of section 7. Those reports were close in time to the 1978 amendments, and their interpretation of amended section 7 is consistent with the view apparent from the 1978 House report.

The structure of the Endangered Species Act confirms that § 7(a)(2) applies only to listed species. Of particular significance is the centrol role played by the Secretary of the Interior in the administration of the Act.[11] Section 4 requires

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[11] The Secretary of Commerce also has significant duties under the Act. Here, however, we are concerned only with the duties of the Secretary of the Interior.

the Secretary to determine by regulation which species are endangered or threatened, to publish a list of such species, and periodically to review the list for necessary changes. Section 5, 16 U.S.C. § 1534, authorized the Secretary to acquire land for the protection of listed species and other plants and wildlife. Section 6, 16 U.S.C. § 1535, authorizes the Secretary to enter into agreements with the states to achieve the purposes of the Act. Section 7(b), as previously noted, requires the Secretary to advise agenices that consult him under § 7(a)(2) on means of protecting covered species. These provisions show that under the Act the Secretary has primary responsibility to research the status of different species, to list those species that are in need of protection, and to act for the preservation of listed species. Thus it would be anomalous to construe § 7(a)(2) as requiring each federal agency, regardless of its inexpertise in matters of environmental protection or wildlife conservation, to decide for itself whether any of the species its proposed action would affect is endangered or threatened. It is more logical to conclude that § 7(a)(2) requires an agency, in consultation with the Secretary, to assess the impact of proposed agency action upon a listed species and to develop plans for the species' protection.[12]

We also note that the plaintiffs' interpretation of § 7(a)(2) would make a nullity of § 7(a)(3), 16 U.S.C. § 1536(a)(3), which requires each agency to consult the Secretary "on any

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[12]The plaintiffs claim that individual federal agencies *are* qualified to decide whether the species their actions will affect are endangered or threatened. They rely upon that provision of § 7(a)(2) which states: "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." That language, the plaintiffs argue, requires agencies to use the best available data to determine species status. We think it clear, however, that the quoted language serves only partially to define the nature of an agency's duties once a listed species has brought § 7(a)(2) into play.

agency action which is likely to jeopardize the continued existence of any species proposed to be listed." Section 7(d), 16 U.S.C. 1536(d), prohibits an agency, pending the completion of a § 7(a)(2) consultation about a listed species, from making any "irretrievable commitment of resources" which would foreclose the formulation or implementation of any reasonable alternative for species protection that the Secretary might suggest under § 7(b). In contrast, § 7(a)(3), concerning proposed species, explicitly states that the consultation it requires does not include the § 7(d) limitation on the commitment of resources. The plaintiffs, however, would extend § 7(a)(2) protection, including the § 7(d) limitation, to all vulnerable species, whether or not listed or proposed for listing. They would thus extend to species not proposed for listing greater protection than § 7(a)(3) grants to proposed species. The plaintiffs' interpretation would make irrelevant the protection afforded by § 7(a)(3) and would violate the basic rule of statutory construction that courts should, if possible, give effect to every word used by Congress. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C. Cir. 1981). For these reasons we conclude that to be protected under § 7(a)(2) a species must be listed under § 4.

The plaintiffs claim that if listing is required under § 7(a)(2), we should treat *senecio franciscanus* as if it were listed. They rely upon the Forest Service's recognition in the Final Environmental Statement that the Preferred Alternative threatens the plant, and upon the fact that the Fish and Wildlife Service, since at least 1976, has been aware of the plant's vulnerability. They contend that the Secretary's failure formally to list the plant since 1976 constitutes unreasonable delay and a violation of the statutory mandate "to halt and reverse the trend towards species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978). We agree with Judge Richey

that there is no evidence of such bad faith or unreasonable conduct on the part of the Secretary as would warrant an injunction against the United State ordering the listing of *senecio franciscanus.*

On November 22, 1982, approximately one month after we heard argument, the Secretary, through the Fish and Wildlife Service, proposed *senecio franciscanus* for listing as a threatened species. 47 Fed. Reg. 52,483 (1982). Because *senecio franciscanus* is now proposed for listing, § 7(a)(3) (discussed above) requires the Forest Service to consult the Secretary about the possible impact of the Preferred Alternative upon the plant. We do not think it necessary to remand this case to the district court to insure Forest Service compliance with § 7(a)(3). Section 7(a)(3) does not incorporate the § 7(d) limitation on commitment of resources and thus does not prohibit development until consultation is completed. More important, we have no reason to believe that the Forest Service has not, or will not, comply with § 7(a)(3). The record indicates that appropriate measures can be taken to minimize the danger to *senecio franciscanus.* We are confident that the Forest Service will, in good faith, implement such measures.

5. *Wilderness Act.*

On May 2, 1979 President Carter, on the advice of the Secretary of Agriculture, recommended to Congress that it designate as wilderness under the National Wilderness Preservation System Act of 1964, 16 U.S.C. §§ 1131-36 (1976), some 14,650 acres of the San Francisco Peaks. Congress has not yet acted upon that recommendation. The area recommended for wilderness designation abuts the Snow Bowl permit area on the north, south, and east, but includes no part of the permit area. A substantial part of the permit area is still undeveloped; in particular, a strip of land approximately 500 feet wide along the area's northern border, adjacent to the recommended wilderness area, remains heavily forested. Under the

Preferred Alternative that strip of land will be partially developed for skiing. The plaintiffs contend that the Secretary of Agriculture, in approving development of pristine land adjacent to a recommended wilderness area, infringed Congress' exclusive authority to determine wilderness area boundaries. The plaintiffs base their claim upon § 3(b) of the Wilderness Act, 16 U.S.C. § 1132(b) (1976), and argue that the Secretary may not, by authorizing expansion of the ski area, impair Congress' discretion to include undeveloped portions of the Snow Bowl in the San Francisco Peaks wilderness area. As Judge Richey found, the plaintiffs' claim is without merit.

Section 1132(b) authorized the President to recommend for inclusion in designated wilderness areas lands contiguous to areas formerly designated as "primitive" by the Secretary of Agriculture. It provides:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed . . . Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress . . . Any [primitive] area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two

> hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.*

(emphasis supplied).

In *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), the Tenth Circuit held that the italicized language reflects "the clear intent of Congress . . . that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation." A "meaningful opportunity" can be preserved only if lands within the ambit of § 1132(b) remain undeveloped until such time as the President and Congress act. Thus in *Parker*, the Tenth Circuit affirmed a district court order enjoining the Secretary from authorizing lumbering of certain virgin land contiguous to a primitive area, where the President and Congress had not yet considered whether to designate the land in question as wilderness.

Parker indicates that § 1132(b) can restrict the Secretary's discretion to approve development of wilderness land contiguous to a designated primitive area. The defendants, however, contend that § 1132(b) does not apply to national forest land which is neither contained in nor contiguous to a primitive area, and that the plaintiffs' claim must therefore fail, as neither the Snow Bowl permit area nor any other part of the San Francisco Peaks has ever been designated primitive. We agree.

The clear focus of the statutory language is upon the Secretary's duties with respect to primitive areas. A brief review of

the statute's background confirms that the statute has no broader application. In 1929 the Secretary of Agriculture, by regulation, established procedures for the designation of primitive areas in national forests. The 1929 regulation was superseded in 1939 by new regulations which authorized the Secretary of Agriculture to designated wilderness areas in excess of 100,000 acres and the Chief of the Forest Service to designate wild areas of between 5,000 and 100,000 acres. The Secretary of Agriculture then reviewed the 73 primitive areas designated between 1929 and 1939 to determine which should be designated in whole or in part as wilderness or wild areas. By 1964, when Congress considered legislation to create a statutory scheme for the protection of wilderness lands, 18 tracts of national forest land had been designated as wilderness areas, 35 as wild areas, and 34 remained in their original classification as primitive areas. *See* H.R. Rep. No. 1538, 88th Cong., 2d Sess. 7-8, *reprinted in* 1964 U.S. Code, & Ad. News, 3615, 3616.[13] Congress concluded that the areas designated as wilderness or wild areas had been "defined with precision." *Id.* at 3617, and could be given statutory protection immediately. Accordingly, in § 3(a) of the Wilderness Act, 16 U.S.C. § 1132 (a), Congress designated as wilderness all areas within the national forests that the Secretary of Agriculture had classified at least 30 days before September 3, 1964 as wilderness or wild. Congress believed, however, that the primitive areas had not been "defined with precision," and that such areas "should not be considered for inclusion in the wilderness system until completion of a thorough review." *Id.* Accordingly, in § 3(b) of the Act, 16 U.S.C. R 1132(b), Congress ordered the Secretary of Agriculture to review each designated primitive area as to its suitability for inclusion in the wilderness system. It thus is clear from § 1132(b)'s limited purpose that the statute applies only to primitive areas and lands contiguous thereto.

[13] Also, one area had been designated as "canoe." *Id.*

Since the Snow Bowl permit area is neither contained in nor contiguous to any primitive area, the plaintiffs have no claim under § 1132(b).[14]

6. *National Historic Preservation Act.*

In his June 15, 1981 opinion, Judge Richey found that the Forest Service had committed three violations of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* (1976), and implementing regulations. First, he found that the Forest Service had not, as required by 16 U.S.C. § 470f and Executive Order 11593,[15] examined the project area to identify properties eligible for inclusion in the National Register of Historic Places. *See* 16 U.S.C. § 470a. Second, he found that the Forest Service had not, as required by 36 C.F.R. § 800.4 (b), consulted the Arizona State Historic Preservation Officer (SHPO) about the effect of the Preferred Alternative upon two National Register properties near the Snow Bowl–the Fern Mountain Ranch, owned by plaintiffs Jean and Richard Wilson, and the C. Hart Merriam Base Camp. Finally, he found that

[14]Additionally, § 1132(b) applies only to forest land "predominantly of wilderness value." 16 U.S.C. § 1131(c) defines "wilderness" as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation . . . with the imprint of man's work substantially unnoticeable . . ." The permit area certainly is not wilderness under that definition. As Judge Richey noted, the permit area contains a ski lodge and ski runs and has been partially cleared of trees. The fact that portions of the permit area remain undeveloped cannot change the fact that the area is not *"predominantly* of wilderness value." We therefore would reject the plaintiffs' § 1132(b) claim even were the statute otherwise applicable. The plaintiffs' reliance upon *Parker v. United States,* 309 F. Supp. 593 (D. Colo. 1970), *affd.,* 448 F.2d 793 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972), is misplaced. Not only was the land at issue in that case contiguous to a designated primitive area, it also contained no development other than a short access road.

[15]Executive Order 11593 is reprinted in 16 U.S.C.A. § 470 (1974) at 26, and at 36 F.R. 8921 (1971).

the Forest Service had not, as required by 36 C.F.R. § 800.4 (a)(1), consulted the SHPO about the eligibility of the San Francisco Peaks themselves for inclusion in the National Register. Judge Richey remanded the case to the Forest Service for compliance with NHPA, and stayed development pending compliance. Upon remand, the Forest Service conducted archaeological surveys of the permit area and consulted the SHPO. On September 22, 1981, the Chief Forester determined that the project area contained no properties either listed or eligible for listing on the National Register; that expansion of the ski area would not affect the historic qualities of the Merriam Base Camp or the Fern Mountain Ranch; and that the San Francisco Peaks themselves were not eligible for listing. The SHPO had concurred in these findings by letter dated September 11, 1981. After the plaintiffs failed to obtain administrative reversal of the Chief Forester's determination, the defendants returned to court to show compliance to Judge Richey. On May 14, 1982 Judge Richey ruled that the Forest Service had complied with NHPA in all respects. He granted the defendants final judgment on all counts and lifted the stay against development.

The plaintiffs claim that Judge Richey erred in finding compliance with NHPA. They contend that the Forest Service's efforts to identify eligible properties in the permit area were legally insufficient; that the Preferred Alternative will affect the historic qualities of the Fern Mountain Ranch;[16] and that the San Francisco Peaks are eligible for listing. The plaintiffs' three contentions will be considered in order.

16 U.S.C. § 470f and implementing regulations, see 36 C.F.R. § 800.4(a), together with Executive Order 11593, require federal agencies approving land use projects to identify all properties within and about the project area that are eligible for

[16]The plaintiffs have on appeal dropped their claim that development will impair the historic qualities of the C. Hart Merriam Base Camp.

listing in the National Register and that may be affected by the project. See *Romero-Barcelo v. Brown*, 643 F.2d 835, 859 (1st Cir. 1981), *reversed on other grounds*, 102 S.C. 1798 (1982). The specific area to be examined for eligible properties is the "area of the undertaking's potential environmental impact," 36 C.F.R. § 800.4(a), which is defined as the "geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur." 36 C.F.R. § 800.3(o). The agency must consult the SHPO when determining the area of potential environmental impact and the scope of surveys needed to identify eligible properties within that area. 36 C.F.R. § § 800.3(o), 800.4(a)(1), (2). The Forest Service and the SHPO agreed that the Preferred Alternative's area of potential environmental impact included the 777 acre permit area, the Snow Bowl road, and 30-foot strips of land on both sides of the road. Forest Service and Northern Arizona University archaeologists in July, 1981 conducted archaeological surveys in which they intensively examined 272 acres, or 35% of the total permit area, including all 77 acres proposed for development under the Preferred Alternative. The surveys revealed no evidence of Navajo or Hopi use and in fact discovered only one archaeological site—the formation of the old Snow Bowl ski lodge that burned in 1952. The Forest Service found the lodge foundation to be ineligible for listing, and the plaintiffs do not argue to the contrary. The SHPO agreed that the surveys satisfied the Forest Service's affirmative obligation to locate and identify eligible properties in the impact area. *See* 36 C.F.R. § 800.4(a)(2).

The plaintiffs argue that the Forest Service breached its NHPA duty to identify *all* eligible properties by failing to survey 100% of the impact area. They contend that the Forest Service's partial surveys may have left some eligible properties undetected. We think that the partial surveys were sufficient. The regulations do not expressly require agencies in all cases completely to survey impact areas, and in fact recognize that

the need for surveys will vary from case to case. *See* C.F.R. § § 800.4(a)(1), (2). We believe that a complete survey is not required where both the partial survey, and all other evidence, indicate that a complete survey would be fruitless. Here, the defendants' surveys discovered neither eligible properties nor any evidence to suggest that such properties might be present in areas not surveyed. The existing literature on the San Francisco Peaks gave the Forest Service no indication of historical or archaeological sites in the impact area. Additionally, the high altitude and steep slopes of the San Francisco Peaks made the impact area an unlikely site for past human habitation and hence an unlikely place in which to find eligible properties. Under these circumstances a complete survey was not required. We find support for our conclusion in the First Circuit's decision in *Romero-Barcelo, supra,* where the Navy conducted a partial archaeological survey of the island of Vieques off the Puerto Rican coast in connection with training operations there to be conducted. The Navy's survey identified numerous eligible properties and suggested the probable existence of other archaeological sites not specifically located. The First Circuit held that § 470f and Executive Order 11593 required the Navy the conduct further surveys to locate the sites thought to be present. Significantly, however, the court stated that its decision did not require the Navy "to undertake a 100% survey of Vieques," or to survey parts of the island where the initial survey established "archeological sterility." 643 F.2d at 860.

As a second ground for reversal, the plaintiffs argue that the Forest Service erred in finding that the Preferred Alternative will have no effect upon the historic qualities of the Fern Mountain Ranch. Section 800.4(b) of 36 C.F.R. requires each agency, in consultation with the SHPO, to determine for each listed or eligible property within the potential environmental impact area, whether the agency project will affect the historical, archaeological, or other characteristic of the property that

qualified it for inclusion in the National Register. The agency is to determine whether an effect is present according to the criteria of 36 C.F.R. § 800.3. If the agency determines that the project will have no effect, the project may proceed. 36 C.F.R. § 800.4(b)(1). If, however, the agency determines merely that the project will have no *adverse* effect, the agency's determination must be submitted to the Advisory Council on Historic Preservation for review and comment, 36 C.F.R. § 800.4(c), and if the agency determines that there will be an adverse effect, the agency must formally consult the Council. 36 C.F.R. §§ 800.4(d), 800.6(b). The plaintiffs argue that Judge Richey erred in failing to require formal consultation under § 800.6(b). We conclude, however, that Judge Richey properly upheld the Forest Service's finding of "no effect."

The Fern Mountain Ranch is located on the western slopes of the San Francisco Peaks, approximately one and one-half miles to the north of the Snow Bowl. The Ranch provides an excellent view of the Peaks' wooded slopes, and of the permit area. Development under the Preferred Alternative will somewhat impair the Ranch's rustic setting since the new ski lifts and slopes will be readily visible from the Ranch. The plaintiffs argue that alteration of the Ranch's natural setting would constitute an "adverse effect" under the regulations. They rely upon 36 C.F.R. § 800.3(b), which defines "adverse effect" as including, *inter alia*, an "alteration of the property's surrounding environment," or the "(i)ntroduction of visual . . . or atmospheric elements that are out of character with the property." The plaintiffs' argument fails to recognize that the § 800.3 criteria are to be applied with reference only to those characteristics of the property that qualified it for National Register listing. *See* 36 C.F.R. § 800.4(b). The Ranch's natural setting is not one of the characteristics that qualified it for listing. Instead, the Nomination Form for the Ranch's listing indicates that the Ranch is historically significant for three reasons:

(1) its original nineteenth-century buildings are still standing and in use; (2) it played an important role, as a rest stop, in the development of the Grand Canyon as a tourist attraction; and (3) it was the first ranch in Arizona to raise Arabian horses. Clearly, the Preferred Alternative will not affect the Ranch's three relevant characteristics and its effect upon the view from the Ranch is, under the circumstances, immaterial. The plaintiffs also argue that the Preferred Alternative will adversely effect the Ranch because the increased tourist traffic at the Snow Bowl will, they say, increase the dangers of trespassing, vandalism, and arson at the Ranch. The Forest Service, however, determined that increased use of the Snow Bowl would not endanger the Ranch. The Forest Service's determination of this factual issue is adequately supported.

The plaintiffs also argue that the Forest Service violated NHPA by finding that the San Francisco Peaks themselves were not eligible for listing. The plaintiffs rely upon the fact that several other mountains and properties which are historically significant principally because of their association with Indian religion or culture have been listed. Those properties, however, may or may not have possessed the particular attributes of the San Francisco Peaks. The determination in each case of a property's eligibility is the responsibility of the agency and of the SHPO, *see* C.F.R. § 800.4(a)(3), and in the absence of an abuse of discretion, their application of the regulations to the facts must be sustained. We agree with Judge Richey that the plaintiffs have not shown an abuse of discretion.

Lastly, the plaintiffs argue that the Forest Service should have requested a final determination of the Peaks' eligibility from the Secretary of the Interior. Section 800.4(a)(3) of 36 C.F.R. states that when a "question" exists as to a property's eligibility, the Secretary shall be requested to make a final determination. Section 63.2(c) of 36 C.F.R. states that a "question" exists "when the agency and the State Historic

Preservation Officer disagree or when the agency determines that a question exists." Here, the Forest Service and the SHPO agreed that the Peaks were not eligible, and the Forest Service did not otherwise determine that a question existed. The plaintiffs' argument that a question existed because the Forest Service and the SHPO relied upon different reasoning in reaching their identical conclusion has no merit. Section 800.4(a)(3), as clarified by § 63.2(c), is obviously intended not to require the agency and the SHPO to reason alike, but only to resolve disputes between the two, and to provide a means by which the Secretary can have the final say on properties of uncertain status.

7. *Land Use Permits.*

In 1977 the Forest Service issued two permits to Northland for use of the Snow Bowl permit area, which on May 18, 1982 were amended to reflect the development approved under the Preferred Alternative. One of the amended permits, covering 24 acres, is a term permit valid until May 1, 1997. The Forest Service granted this permit under the Act of March 4, 1915, as amended, 16 U.S.C. § 497 (1976), which provides:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; . . .

Northland will build the ski lodge and all other permanent facilities upon the land covered by the term permit. The other permit, an annual or revocable permit covering the

remaining 753 acres of the permit area, was issued by the Forest Service under the authority of the Act of June 4, 1897, as amended, 16 U.S.C. § 551 (1976), which authorizes the Secretary of Agriculture to "make such rules and regulations . . . as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The land covered by the revocable permit will be used only for ski slopes.

The plaintiffs challenge the validity of the "dual permit" system employed by the Forest Service. They contend that 16 U.S.C. § 497, which authorizes permit areas no larger than 80 acres, constitutes the sole authority under which the Secretary may grant permits for the private recreational development of national forest lands. They accordingly claim that the Forest Service exceeded its authority in issuing a revocable permit under 16 U.S.C. § 551 and in granting permits covering 777 acres to a single developer. We agree with Judge Richey that § 497 does not limit the Secretary's authority under § 551 and that Congress has sanctioned the use of dual permits.

In 1905 Congress transferred the management of the national forests from the Secretary of the Interior to the Secretary of Agriculture. Act Feb. 1, 1905, c. 288, § 1, 33 Stat. 628. As early as May 31, 1905 the Attorney General informed the Secretary of Agriculture that the Act of 1897, as amended, authorized him to grant revocable permits for the private, commercial use of national forest land. 25 Op. Atty. Gen. 470 (1905). The Secretary of Agriculture thereafter routinely granted revocable permits for many purposes, including summer houses and camping grounds, under the 1897 Act. In 1911 the Supreme Court upheld the authority of the Secretary to grant revocable grazing permits under the Act. *United States v. Grimaud*, 220 U.S. 506 (1911).

In 1915 Congress enacted legislation, now § 497, which, in contrast to the Act of 1897, expressly authorized the Secretary of Agriculture to grant private permits to national forest land. The 1915 Act authorized the Secretary to grant term permits to areas not larger than five acres for periods not exceeding 30 years. The plaintiffs claim that the 1915 Congress intended to repeal whatever permit authority the Secretary possessed under the 1897 Act. The plaintiffs' argument has no support in the legislative history, which instead suggests that Congress acted not to repeal the Secretary's existing powers, but to enable him, for the first time, to grant long-term permits. The Congress recognized that the permanent structures necessary for recreational use of the national forests would not be built unless private parties could obtain secure tenure. Congressman Hawley, the sponsor of the House bill, stated:

> At present the people have an unlimited right to go upon the public land in the national forests. They can go there and build a temporary camp, put up a tent or a little camp of some kind. They are given now by the Secretary of Agriculture permission to construct temporary structures. But it does not enable them to put up any important building, or to justify any considerable expenditure. But if they could get permission for a period of years they can afford to put up a better building(.)

52 Cong. Rec. 1787 (1915). Significantly, the Congress had before it a letter from the Secretary of Agriculture which discussed the Secretary's practice of granting revocable permits under the 1897 Act.[17] The letter stated:

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[17] The letter was both included in the House committee report, H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1915), and read during debate by Congressman Hawley. 52 Cong. Rec. 1787 (1915).

> There is at the present time some hesitancy on the part of persons who want to use national-forest land upon which to construct summer residences, hotels, stores, and other structures involving a large expenditure, because of *the indefinite tenure of the permits to them which the present law provides for.* At the present time, however, *there are several thousand such permits in use,* upon which structures have been erected. In justice to those who desire to construct more substantial improvements, it is believed that the present law should be amended to give persons a better right than the *revocable permit now authorized.*

(emphasis supplied). We must therefore presume that when Congress acted in 1915 it had knowledge of the Secretary's practice under the 1897 Act. Accordingly, the absence in the Act and in the legislative history of any language expressly repudiating the Secretary's practice is strong evidence that Congress did not intend the 1915 Act to affect the Secretary's power to issue revocable permits. Certainly the plaintiffs have shown no reason to depart from the settled Rule disfavoring repeal by implication. *See Watt v. Alaska,* 451 U.S. 259, 267 (1981).

We conclude, therefore, that the 1915 Act neither limited the Secretary's power to issue revocable permits to areas larger than five acres nor prohibited him from issuing revocable and term permits simultaneously. Our conclusion is reinforced by Congress' awareness of, but failure to repudiate, the continuing practice of the Forest Service after 1915 to issue revocable permits under the 1897 Act. The Forest Service, following the 1915 Act, believed that the purposes of the Act could not be achieved unless it had authority to issue term permits to areas larger than five acres. Congress in the 1930's and 1940's considered several bills that would have expanded the Forest Service's authority to grant term permits, but enacted none of

them. These bills are nonetheless significant because the reports they generated gave Congress clear notice that the Forest Service was continuing to issue revocable permits for recreational uses, and further, was issuing dual permits. For example, the Senate report on S. 773 (72nd Cong., 1st Sess. (1932)), contains a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture and Forestry, which states:

> The general laws relating to the national forests do not authorize the issuance of permits *other than terminable at the discretion of the Secretary of Agriculture*. One act, that of March 4, 1915 . . . authorizes the issuance of permits for not to exceed 30 years and for areas of not to exceed 5 acres . . . Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc., which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc., now regarded as essential to such services. *At present these are provided by the issuance of supplemental terminable permits*, which inject an undesirable element of uncertainty of tenure and add to routine requirements of administration.

S. Rep. No. 754, 72d Cong., 1st Sess. 2 (1932) (emphasis supplied). Similarly, in connection with H.R. 1809 (80th Cong., 1st Sess. (1948)), the Acting Secretary of Agriculture sent the Chairman of the Committee on Agriculture a letter, which stated:

> Of course, the large majority of . . . permitted uses [in the national forests] are of relatively short duration or entail only small capital investments. In such circumstances *the type of terminable permit, renewable from year to year, which this Department is authorized to issue without limitation as a character of use or area*, is adequate.

H.R. Rep. No. 805, 80th Cong., 1st Sess. 2 (1948) (emphasis supplied).[18]

In 1956 Congress finally amended the 1915 Act to grant the Secretary broader power to issue term permits. The amendment increased the acreage limitation in § 497 from five acres to 80 because effective recreational development of the national forests had been stymied by the five-acre limitation on term permits. *See* H.R. Rep. No. 2792, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 3634. The committee reports, far from repudiating the Secretary's practice of issuing revocable permits, expressly approved the practice:

> The Department of Agriculture now has adequate authority to issue revocable permits for *all* purposes under the act of June 4, 1897 (16 U.S.C. § 551). Its authority to issue term permits . . . would be broadened by S. 2216(.)

S. Rep. No. 2511, 84th Cong., 2d Sess. 1, (emphasis supplied), *quoted in* H.R. Rep. No. 2792, *supra*, at 2, 1956 U.S. Code Cong. & Ad. News at 3635. Congress has not amended either § 497 or § 551 in relevant part since 1956.

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[18] H.R. 1809, as originally proposed, would have authorized the Secretary to grant term permits to areas not larger than 80 acres for periods not exceeding 30 years in all of the national forests. The House Committee on Agriculture amended the bill to apply only to Alaskan national forests, because it believed that broadening the Secretary's powers as to other national forests might have undesirable results. *See* H.R. Rep. No. 805, 80th Cong., 1st Sess. 1 (1948). The bill passed as amended. 16 U.S.C. § 497a (1976). The plaintiffs argue that the amendment to H.R. 1809 reflects Congress' intent not to allow the Secretary to issue permits to large areas in the lower 48 states. The better interpretation, however, is that Congress was not yet ready to authorize the Secretary to grant *term* permits to areas larger than 5 acres. The legislative history of H.R. 1809 nowhere disapproves of the Secretary's practice of issuing dual permits and revocable permits to areas larger than 5 acres. As the quoted letter illustrates, Congress knew of that practice.

We conclude, then, that the Secretary has consistently interpreted the Act of 1915 as *not* limiting his authority to issue revocable permits under the Act of 1897; that Congress has for decades had knowledge of the Secretary's interpretation, but has never objected; and that on the one occasion when Congress did not comment on the Secretary's interpretation and practice, in 1956, it expressed approval. Under these circumstances the Secretary's authority to issue revocable permits under § 551, whether or not exercised in connection with dual permits, cannot be doubted. As this court stated in *Kay v. FCC*, 443 F.2d 638, 646-47 (1970), "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." (footnote omitted).

In *Sierra Club v. Hickel*, 433 F.2d 24, 35 (9th Cir. 1970), *affd. on other grounds sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972), the Ninth Circuit approved the practice of issuing dual permits to ski resort operators[19] and, in language highly instructive here, stated:

> The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of

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[19] *Sierra Club* vacated a preliminary injunction enjoining the Secretaries of Interior and Agriculture from authorizing a large-scale, private recreational development in the Sequoia National Forest. Because *Sierra Club* involved an interlocutory appeal it required the Ninth Circuit to decide only whether the plaintiffs had shown a strong likelihood of success, it did not make a final determination of the validity of dual permits. That issue therefore technically remains open in the Ninth Circuit. *See Sierra Club v. Morton*, 348 F. Supp. 219, 220 (N.D. Cal. 1972). *Sierra Club* did, however, give detailed consideration to the legality of dual permits.

> their legality. Many of these developments are ski developments making use of the maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres . . . It seems apparent, as was obvious to both [the 1956] Senate and House Committees, that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon lands held under revocable permits.

(footnote omitted). The Forest Service has continued, following the decision in *Sierra Club*, to grant dual permits to ski resort operators. There are presently about 200 ski developments in the national forests and most of them employ dual permits.[20]

The case of *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973), cited by the plaintiffs, does not support their argument. In *Wilderness Society*, the plaintiffs challenged the issuance of rights-of-way and special land use permits by the Secretary of the Interior to a consortium of oil companies for the construction of the Alaska pipeline. The permits covered land greater in width than the express limitation contained in § 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185. This court found that § 28 constituted the Secretary's sole authority to issue permits for the use of federal land for oil pipelines, and held that the Secretary had exceeded his authority in failing to adhere to the width limitations. The plaintiffs also contended that the permits issued by the Secretary violated § 497. The court found it unnecessary to decide that claim, and declined to comment on the Ninth Circuit's decision in *Sierra Club*. The court did, however, note that § 497 had "no provision comparable to that in

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[20] S. Rep. No. 1019, 94th Cong., 2d Sess. 8 (1976).

Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." 479 F.2d at 870. That distinction between the language of § 497 and of § 28, together with the legislative history recounted above, indicate clearly enough that § 497, unlike § 28, cannot be read as an exclusive grant of authority as to the uses in question.[21]

Finally, the plaintiffs claim that even if the Secretary had authority under § 497 and 551 to issue dual permits to Northland, the 753-acre permit issued under § 551 is invalid because not actually revocable. We see no merit in this claim. The Forest Service's continuing power to revoke the § 551 permit is apparent from the permit's terms, which state that the permit will terminate on May 1, 1997 unless previously terminated "upon breach of any of the conditions herein *or at the discretion of the regional forester or the Chief, Forest Service.*" (emphasis supplied). The plaintiffs argue that the permit is not truly revocable because the Forest Service's own regulations require a rational basis for the revocation of such permits, *see* 36 C.F.R. § 251.60(b) (1982), and subject revocations to administrative review. 36 C.F.R. § 211.19 (1982). The plaintiffs have now, however, cited any authority holding that a

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[21] In both 1975 and 1977 the Senate considered bills which would have substantially revised the Forest Service's authority to issue permits for the private recreational use of national forest land. The bills expressly authorized the Forest Service to grant term permits to ski resort operators to areas larger than 80 acres. S. 1338, 95th Cong., 1st Sess. § 3, 123 Cong. Rec. 11,643 (1977); S. 2125, 94th Cong., 2d Sess. § 3 (1976). The bills never became law. Although the bills were intended to achieve a number of goals, they were proposed, in part, because of concern that under *Wilderness Society v. Morton* the Forest Service's practice of issuing dual permits might be illegal. *See* 123 Cong. Rec. 11,641 (1977) (Remarks of Sen. Haskell); S. Rep. No. 324, 95th Cong., 1st Sess. 11-12 (1977); S. Rep. No. 1019, 94th Cong., 2d Sess. 8-9 (1976). However, as stated above, *Wilderness Society* does not preclude the issuance of dual permits under §§ 497 and 551.

permit to be "revocable," must be revocable at the mere arbitrary will of the issuing authority, and we decline to read such a requirement into the authorizing statute. *Cf. Sierra Club, supra,* 433 F.2d at 35. The plaintiffs also argue that the permit is not revocable because the Forest Service is unlikely to revoke it before the term permit expires. The short answer is that the Forest Service has power to revoke.

CONCLUSION

We also agree with Judge Richey's disposition of the plaintiffs' remaining claims. Accordingly, we affirm the judgment of the district court.

APPENDIX "B"

Opinion and Order
Dated June, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

HOPI INDIAN TRIBE,

Plaintiffs,

v.

JOHN R. BLOCK, *et al.*,

Defendants.

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, *et al.*

Defendants.

Civil Action No. 81-0058

RICHARD F. WILSON and JEAN WILSON,

Plaintiffs

v.

JOHN R. BLOCK, *et al.*,

Defendants.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

The instant action originated as three separate lawsuits brought by the Hopi Indian Tribe, the Navajo Medicinemen's Association and Richard and Jean Wilson. The Hopi Indian Tribe is a federally recognized tribe of American Indians whose aboriginal lands include areas of Northeastern Arizona where the tribe has existed for over one thousand years. The Navajo Medicinemen's Association is an association of medicinemen and medicinewomen who have received special training in the traditional religious beliefs and practices of the Navajo. Richard and Jean Wilson are private landowners who own and periodically occupy a ranch in the area of the San Francisco Peaks—the land in question in this action. Because there were questions of law or fact common to all of these actions, this Court, by Order dated March 10, 1981, consolidated these actions.

The original party defendants are various officials within the Agriculture Department. On May 27, 1981, the Court granted the motion of Northland Recreation Corporation, the permittee on the land in question, to intervene as a defendant.

In their complaints, plaintiffs challenge the action taken by the federal defendants in authorizing the further development of recreational facilities known as the Arizona Snow Bowl located in the Coconino National Forest in Arizona. The approved expansion would take place within a 777 acre permit area of the 75,000 acre area of the San Francisco Peaks. All of these plaintiffs seek to prevent the expansion of the existing facilities; two of the three plaintiffs, the Hopi Indian Tribe and the Navajo Medicinemen's Association, also seek to have the existing facilities removed. Plaintiffs claim that the operation and expansion of this facility constitutes a violation of the plaintiff's First Amendment guarantee of free exercise of religion due to the sacred nature of the mountains and their centrality to both the Hopi and Navajo religions. In addition,

plaintiffs claim that the defendants have violated the American Indian Religious Freedom Act, the National Environmental Policy Act, the Endangered Species Act, the Wilderness Act, the Multiple-Use Sustained-Yield Act, the National Historic Preservation Act, the statutes governing the issuance of permits (Acts of June 4, 1897 and March 4, 1915), an alleged trust relationship between the Forest Service and the native Americans and the Administrative Procedure Act.

Both the federal defendants and the intervenors filed motions to dismiss. The intervenors seek to dismiss the complaint of the Wilson plaintiffs for failure to exhaust administrative remedies and lack of standing to assert constitutional rights of the Indian plaintiffs. The federal defendants have also moved to dismiss the Wilson plaintiffs because of the lack of standing under the First Amendment and the American Indian Religious Freedom Act; and, in addition, the government has moved to dismiss the complaints of the Hopis and Navajos as to their request for the removal of the existing facilities based on the doctrine of laches. The plaintiffs and defendants have also filed cross-motions for summary judgment.

I. *Motions to Dismiss*

Defendants argue that pursuant to Article III of the United States Constitution which authorized federal courts to hear only bona fide cases or controversies, plaintiffs Wilson lack standing to raise both the First Amendment constitutional issues and the issues concerning the American Indian Religious Freedom Act (AIRFA). Article III's requirement that courts hear only "cases and controversies" dictates that a determination must be made as to whether a party has a sufficient personal stake in the outcome of the controversy and hence whether they have standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962). Courts have found that a mere

abstract interest in the dispute cannot confer standing upon an otherwise uninjured party. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *Sierra Club v. Morton*, 405 U.S. at 735.

The defendants herein allege that the Wilsons have merely an abstract interest in the Indians' First Amendment rights and therefore have no standing to assert those claims without some showing of concrete injury to themselves or their own First Amendment rights. They, as non-Indians, are not the proper proponents of the religious rights allegedly infringed upon by defendants' actions. The Court agrees.

The Supreme Court has repeatedly stated that one may not claim standing to vindicate the constitutional rights of some third party absent a compelling reason to do so. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Flast v. Cohen*, 392 U.S. at 99 n.20; *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Barrows v. Jackson*, 346 U.S. 249, 255, *rehearing denied*, 346 U.S. 841 (1953).

In the instant action, there is no compelling reason to allow these plaintiffs to litigate the First Amendment rights of a third of a third party, because the third parties whose rights are being asserted are presently before the Court. Courts have recognized that third parties themselves usually will be the best proponents of their own rights, and that the standing requirement is aimed at assuring that concrete adverseness which sharpens the presentation of the issues upon which the Court so largely depends. *Singleton v. Wulff*, 428 U.S. at 114; *Baker v. Carr*, 369 U.S. at 204. Accordingly, the Court grants defendants' motion to dismiss the Wilson plaintiffs' complaint as to the First Amendment and American Indian Religious Freedom Act claims.[1]

[1]The parties agreed at oral argument to have any papers which had been submitted by the Wilson plaintiffs on the First Amendment and American Indian Religious Freedom Act claims to be received by the Court as *amicus curiae*.

The intervenor-defendants also have moved to dismiss the Wilson plaintiffs' complaint for failure to exhaust administrative remedies. The intervenors claim that the Wilson plaintiffs failed to participate in the final level of administrative review because they merely filed a statement with the Regional Forester within the statutorily required 30-day period which accepted the Regional Forester's decision but reserved their rights with respect to all matters which they had previously raised. The intervenors claim that because 36 C.F.R. § 211.19 provides no specific procedure for preserving one's right to further appeal, this statement is inadequate to constitute notice of appeal. The Court disagrees.

Within the time period specified in 36 C.F.R. § 211.19(k), the Wilsons filed with the Regional Forester a document entitled "Statement in Support of Regional Forester's Decision, Notice of Contingent Appeal and Statement of Reasons in Support thereof or, alternatively, Request to Intervene in Support thereof, Notice of Association of Counsel." The Notice stated, in pertinent part:

> For these limited purposes and to avoid any possible waiver, administrative estoppel or res judicata, and any possible effect of the doctrine of exhaustion of administrative remedies, this statement is deemed a Notice of Appeal and statement of reasons in support thereof within the meaning of 36 C.F.R. § 211.19 and to that end all matters previously filed or submitted by Wilson in this appeal of whatever kind or nature are hereby expressly incorporated herein by reference as if set forth verbatim.

This notice was received in the Office of Regional Forester and forwarded to the Chief Forester in Washington, D.C., who, on March 28, 1980, granted the Wilsons' request to participate in further levels of review. On December 31, 1980, the Chief Forester rendered the decision which is the subject of this litigation and further review was declined by the Secretary of Agriculture.

In accordance with the principles that liberality of construction with respect to notices of administrative appeal is the rule, the Court deems the Wilsons' notice to be adequate. "The sufficiency of a notice of administrative appeal should be liberally construed as long as an adverse party is not prejudiced thereby." *Gentry v. United States*, 546 F.2d 343, 348 (Ct. Cl. 1976), *rehearing denied*, 551 F.2d 852 (Ct. Cl. 1977)(a claimant's document simply asking for "review" of the agency's decision was adequate notice); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973)(telephone call to a federal agency was possibly sufficient as a notice of appeal); *Gernand v. United States*, 412 F.2d 1190 (Ct. Cl. 1969), *cert. denied*, 414 U.S. 844, *rehearing denied*, 414 U.S. 1017 (1973)(a former employee's letter to the President of the United States and subsequent referral to the Civil Service Commission was deemed clear notice that the plaintiff was appealing the agency decision).

In the instant action, the government plainly had sufficient notice of the Wilson's position to review the case in light of their assertions and therefore were not misled or prejudiced by that notice.[2] Accordingly, the intervenor's motion to dismiss the Wilson plaintiffs for failure to exhaust administrative remedies is denied.

Finally, the federal defendants have filed a motion to dismiss the Hopi Tribe's and Navajo Medicinemen Association's claims seeking removal of the existing Arizona Snow Bowl facilities. Defendants maintain that plaintiffs' claim to such relief is barred by the laches doctrine. However, in light of the Court's disposition of the issues raised by the plaintiffs on summary judgment, the Court need not decide this issue.

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[2]It should be noted that the federal defendants have not raised the defense of failure to exhaust administrative remedies.

II. *Motions for Summary Judgment*

A. Free Exercise of Religion

The First Amendment to the Constitution of the United States guarantees the Navajo and Hopi plaintiffs that the federal government will take no action "prohibiting the free exercise" of their religions. The plaintiffs herein allege that the defendants' decision to permit the continued operation and further expansion of the Arizona Snow Bowl ski resort on the San Francisco Peaks constitutes a violation of this fundamental obligation. The plaintiffs claim that the San Francisco Peaks play a central, dominant and vital role in both the Hopi and Navajo religions and that the Chief Forester's decision to allow expansion ignores the fact that the free exercise of religion depends upon these mountains remaining sacred and free from manmade disturbances.

The record is replete with descriptions and testimony concerning the Indians' religious beliefs. The Hopi Indians believe that for six months of every year, the "kachinas," spiritual beings sent as emissaries to the Hopis by the creator, reside in the Peaks. During the other six months of the year, they travel to the Hopi villages to participate in the various religious ceremonies and rituals referred to as the Kachina cycle. Numerous Hopi shrines are located in the Peaks and are visited by Hopi religious leaders.

The Navajos believe that the San Francisco Peaks are one of the four sacred mountains making the boundaries of the Navajo homeland. They believe that the mountains bring harmony and balance to the lives of the Navajo people, protect them from destructive forces and sustain the integrity of their spiritual and physical health.

The defendants have stipulated in the Joint Stipulation of Material Facts filed in this matter, that "[t]he Navajo plaintiffs believe that the Peaks are themselves a sacred body and a spiritual being or god with various peaks forming the head, shoulders, and knees of a body reclining and facing the East, while

the trees, plants, rocks and earth form the skin of this sacred body;" that "[t]he Navajo plaintiffs pray directly to the Peaks and regard them as a living diety;" that "[t]he Peaks are invoked in religious ceremonies in order to heal the Navajo people and to bring harmony, balance and natural order to their lives;" that "[t]he Navajo plaintiffs believe that cutting, digging or other manmade disturbances of the natural state of the Peaks causes the deity to lose its healing of the Navajo people and the restoration of harmony, balance and natural order to their lives which such ceremonies effect;" and that the Peaks are important to Navajo religious beliefs and are the subject of many prayers and songs that comprise their religion." *See* Joint Stipulation of Material Facts, pp. 7-8.

However, despite these religious beliefs, the Chief Forester's decision of December 31, 1980, concluded that "[a]lthough Native Americans may consider development and use of the Arizona Snow Bowl to be adverse to their religious beliefs, neither the First Constitutional Amendment nor the American Indian Religious Freedom Act provide protection from such development." This Court agrees with this determination and accordingly finds for the defendants as to the Free Exercise claim for the following reasons.

The Tenth Circuit, in *Badoni v. Higginson*, 638 F.2d 172, 176-77 (1980), set forth the test under the Free Exercise clause of the First Amendment:

> Analysis of a free exercise claim involves a two-step process. We first determine whether government action creates a burden on the exercise of plaintiffs' religion. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against . . . the practice of [their] religion. *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963). The practice allegedly infringed upon must be based on a system of belief that is religious, *see, e.g., United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944).

If such a burden is found, the action is violative of the Free Exercise clause, unless the government establishes an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise clause." *Wisconsin v. Yoder*, 406 U.S. at 214, 92 S. Ct. at 1532.

Defendants here do not challenge the fact that the plaintiffs' beliefs are sincerely held. *See* Joint Stipulation of Material Facts No. 28. Therefore, in determining whether the Government's action creates a burden on the exercise of plaintiffs' religion, the only real issue is whether there is "a coercive effect of the enactment as it operates against the practice of [their] religion."

As the Court in *Badoni* recognized, Free Exercise claims generally challenge government dictates which compel citizens to violate the tenets of their religion, *see Wooley v. Maynard*, 430 U.S. 705 (1977) (statute requiring all motor vehicles of New Hampshire to bear the motto "live Free or Die" violated Jehovah's Witness followers' First Amendment Rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Wisconsin's compulsory education law violated Amish free exercise of religion), or government action which conditions a benefit or right or reward on one's rejection of a religious practice. *See Thomas v. Review Board of the Indiana Employment Security Division*, 49 U.S. L.W. 4341 (U.S. April 6, 1981) (Unemployment compensation may not be denied someone who for religious reasons could not continue to produce weapons); *McDaniel v. Paty*, 435 U.S. 618, 633-34 (1978) (Tennessee provisions barring ministers from serving as delegates or legislators violated the First Amendment; *Sherbert v. Vernor*, 374 U.S. 398 (1963) (Disqualification of appellant from unemployment compensation because of refusal to work on Saturday contrary to religious beliefs violated the Free Exercise clause).

The government here has not forced the plaintiffs to embrace any religious belief or to say or believe anything in con-

flict with their religious tenets; nor have they forced plaintiffs to chose between their religious beliefs and some public benefit. Therefore the Court must look to whether there is a "coercive effect" in that the defendants have prohibited the plaintiffs' practice of their religion. We find there is no such prohibition and, therefore, no such coercive effect which violates the Free Exercise clause.

The government here has not prohibited plaintiffs' religious exercise in the area of the San Francisco Peaks. In fact, plaintiffs have utilized the Arizona Snow Bowl facilities to further their religious practices by gaining access to high levels of the Peaks. *See* Joint Stipulation of Material Facts No. 2. The affidavits of Dr. Robert Euler and Dr. Jerrold Levy both support the conclusion that as long as the Indians have continued access to the Peaks, the Snow Bowl will not impinge upon the continuation of all essential ritual practices. Levy affidavit ¶¶ 10, 13; Euler affidavit ¶¶ 8-9. Dr. Levy states that the soil and ritual goods used in the ceremony do not have to actually come from the Peaks and that the Snow Bowl permit area does not involve any of the areas used by the Hopi for their shrines or final approach to the Summit or the Peaks. *See* Levy affidavit ¶¶ 9.9, 9.12, 12. In fact, the Snow Bowl operation has been in existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have managed to coexist with the diverse developments that have occurred there.[3]

In *Sequoyah v. TVA*, 620 F.2d 1159, Cherokee Indians challenged the flooding of the Little Tennessee Valley and consequent lack of access to historically significant cities due to completion of the Tellico Dam. The Sixth Circuit determined that because the plaintiffs' claim could not show damage to their *particular religious observances*, there was no burden imposed on the plaintiffs' free exercise of religion. The Court

[3]It should be noted that there are numerous other permitted uses on the Peaks. *See* Map of the Peaks attached to the Joint Stipulation of Material Facts.

looked to numerous decisions that premised a finding of a Free Exercise violation on a determination of the centrality of plaintiffs' affected practices to their religion and found that the plaintiffs failed to show the "centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances." *Id.* at 1164. *See Wisconsin v. Yoder*, 406 U.S. at 215-216; *Frank v. Alaska*, 604 P.2d 1068 (Alas. 1979) (Meat from an illegally killed moose formed the "cornerstone" of a religiously required funeral patloch); *People v. Woody*, 61 Cal. 2d 716, , 40 Cal. Rptr. 69, , 394 P.2d 813, 817, (Cal. 1964) (Court found peyote played a "central" role in a ceremony that was the "cornerstone" of the Native American Church). The Court in *Sequoyah* then looked to the affidavits disclosing that medicines no longer available in the flooded area are available at higher places and determined that the plaintiffs had not shown damage to particular religious observances and, therefore, there was no infringement of a constitutionally cognizable First Amendment right.

In the instant act, the infringement is even less severe because plaintiffs are not denied total access to their religious sites as they were in *Sequoyah*. Plaintiffs do not allege that the Forest Service has prevented them from collecting soil, tree boughs, stones or any other objects from the Peaks nor have they shown that the permit area of the San Francisco Peaks is central or indispensable to their religion. Rather, plaintiffs' action is based on an unusual claim. Plaintiffs are not alleging that the government directly infringed upon their religious beliefs, nor are they alleging that the government directly interfered with or impeded their religious ceremonies. Their claims, instead, are based on the indirect effect that desecration of the Peaks will have on their religion. They are essentially claiming that anyone asserting a religious interest in government property, albeit a sincere one, has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of,

this property in order to facilitate the exercise of their religious beliefs. This Court will not extend the First Amendment to such limits. Not only is there an insufficient showing of a burden on plaintiffs' Free Exercise rights, but such a result would clearly fly in the face of the principles of the Establishment clause of the First Amendment.

B. The Establishment Clause

Defendants claim that the plaintiffs cannot compel the government to operate the San Francisco Peaks primarily as a religious shrine to satisfy their own particular religious interests, because what the plaintiffs request in the name of the Free Exercise clause is affirmative action by the government which violates the Establishment clause of the First Amendment.

The Court of Appeals for the District of Columbia Circuit has set forth the test under the Establishment clause in the case of *Allen v. Morton*, 495 F.2d 65, 68 (D.C. Cir. 1973). Under *Allen*, an act or law must meet three tests to avoid the Establishment clause: (1) the act or law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances or inhibits religion; and (3) the act must avoid excessive government entanglement. The relief requested herein by the plaintiffs clearly would not meet the requisite standard. Should the defendants be forced to either discontinue operation of the Snow Bowl or prohibit its expansion, the purpose would not be secular but would be *solely* religious, and its primary effect would be to advance the religious interests of the Indian plaintiffs. The government cannot use federal property for such purposes.

The Tenth Circuit recently dealt with this issue in the case of *Badoni v. Higginson*, 638 F.2d 172, which is based on a very similar set of facts as the case at bar. In *Badoni*, Indian plaintiffs claimed that management by the government of the Rainbow Ridge National Monument and of the Glen Canyon Dam

and Reservoir on the Colorado River 58 miles below the Monument violated the Free Exercise clause for two reasons: (1) in impounding water to form Lake Powell, the government had drowned some of the plaintiffs' gods and denied the plaintiffs access to a prayer spot sacred to them, and (2) by allowing tourists to visit the Rainbow Bridge, the government had permitted desecration of the sacred nature of the site and had denied plaintiffs' their right to conduct religious ceremonies at the prayer spot. In relation to their second claim, the plaintiffs alleged that by permitting public access and the operation of commercial tour boats, the government had burdened the practice of plaintiffs' religion. However, the Court in *Badoni* found that the government had not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge because plaintiffs could enter the Monument on the same basis as other people. *Id.* at 178. The Court went on to say that the government has a strong interest in assuring public access to the monument and that "issuance of regulations to exclude tourists from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause." *Id.* at 179.

The Court also denied relief insofar as plaintiffs wanted the government to police the actions of the tourists visiting the Monument, stating that:

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Id., quoting Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.). Were it otherwise, the Court reasoned, the Monument would become a government-managed religious shrine. 638 F.2d at 179.

Similarly, the plaintiffs here seek to have the government restrict the public's use of these mountains solely because of the religious beliefs of the plaintiffs. They want the San Francisco Peaks to become a "government-managed religious shrine" to the exclusion of any development. However, the permit area land, which was designated part of the San Francisco Mountain Forest Reserve on August 17, 1898, and became a part of the Coconino National Forest on July 2, 1907, is managed according to numerous federal laws which provide for multiple uses for the benefit of the general public.[4] The Secretary of Agriculture has the duty to maintain the National Forests for multiple uses pursuant to the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 (1976). Pursuant to this authority, the Secretary has developed long-range national resource plans for the management of the natural resources and uses of the national forests. *See* Kerrick affidavit ¶ 9; Kirkpatrick affidavit ¶ 12. The plaintiffs do not have a constitutional right under the First Amendment to require that the government manage this property as a religious shrine for them; not only is it not required by the First Amendment, but it is clearly prohibited by the Establishment clause.

C. The American Indian Religious Freedom Act

The American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996, provides that "[o]n or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Alleut, the Native Hawaiians, including, but not limited to, access to sites, uses and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."

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[4] *See* 16 U.S.C. § § 472-82, 528, 531.

The plaintiffs allege that the Forest Service has wholly failed to apply this law in determining to authorize the expansion of the Snow Bowl facilities. They claim that if the legislation is to have any meaning, then it must require, at the very least, that the defendants take the remedial actions necessary to stop this alleged infringement of the plaintiffs' religious rights. Brief of the Navajo Medicinemen's Association, p. 17.

The defendants argue that AIRFA creates three duties for federal agencies, all of which have been complied with: (1) to evaluate their policies and procedures with the aim of protecting Indian religious freedom; (2) to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies; and (3) to consult with Indian groups in regard to the proposed actions. Defendants here have met their obligations under the Act. The Court agrees.

The legislative history of AIRFA reveals that the purpose of the Act was to "insure that the policies and procedures of various federal agencies as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." H. Rep. 1308, 95th Cong., 2nd Sess. (1978). The Act was meant to insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees.

What the Act does require is that agencies evaluate their policies and procedures with the aim of protecting Indian religious freedoms. *See* 124 Cong. Rec. H6872 (daily ed. July 18, 1978) (Remarks of Rep. Udall). Here, the defendants have clearly complied with this mandate. The Administrative Record contains many references to Forest Service meetings with the plaintiffs both on and off the reservations and numerous hearings were held at which Hopi and Navajo representatives testified. *See* Kirkpatrick Affidavit ¶ 11; Final Environmental Statement ("FES") at 57-60, 159, 164-174.

What the plaintiffs here are really objecting to is not the review process that took place pursuant to AIRFA, but the decision which was rendered as a result of it. However, the Court finds that AIRFA was never meant to have such a broad interpretation. The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that Native traditional religious considerations always prevail to the exclusion of all else. It requires that the agencies evaluate their policies with the aim of protecting Indian religious freedoms, and that they not deny access to the sacred sites, use and possession of sacred objections and the freedom to worship. The Forest Service has complied with these requirements, and the Court therefore finds no violation of AIRFA.

D. Breach of Fiduciary Duty

Plaintiffs claim that throughout the administrative proceedings, the defendants have ignored the fiduciary duty which is owed to the Indian plaintiffs by virtue of their guardian-ward relationship. *See Morton v. Mancari*, 417 U.S. 535, 541-42 (1974); *United States v. Kagama*, 118 U.S. 375, 382 (1886). They claim that this responsibility includes the duty to protect traditional Indian resources and communities, as well as the religious beliefs and practices, and that the decision to expand the Arizona Snow Bowl is in direct conflict with the duty to protect the interests of the Indians as their trustee.

However, as plaintiffs have conceded, this fiduciary duty does not exist in a vacuum. The scope of the trust responsibility in an particular situation between a federal agency and an Indian tribe or individual is defined by the statute, treaty or executive order which specifies the particular duty or relationship at issue. *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980). In *Gila River Pima-Maricopa Indian Community v. United States*, the Court set forth this principle:

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presently arises. It is true that the word "fiduciary" and the express "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians.

140 F. Supp. 776, 781 (Ct. Cl. 1956).

Plaintiffs allege that the statute which creates this trust responsibility is AIRFA. This argument is indeed unique in that courts have generally found a trust relationship to exist only in cases that deal with Indian property, funds or programs. *See Gila River Prima-Maricopa Indian Community v. U.S.*, 427 F.2d 1194, 1196, 1198-99 (1970), *cert. denied*, 400 U.S. 819 (1970); *Eric v. Secretary of U.S. Department of Housing and Urban Development*, 464 F. Supp. (D. Alas. 1978); *White v. Califano*, 437 F. Supp. 543, 535 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978). However, plaintiffs allege that AIRFA is an unambiguous declaration that the Federal government has a legal responsibility to protect and preserve Indian religious freedom to believe, express and exercise traditional religions.

The Court agrees with the plaintiffs in that the Act imposes an obligation on the federal government to protect Indian religious freedoms when developing any federal policies; however, the Act does not create a "fiduciary relationship" as such,

and the Court is not willing to imply one. The Supreme Court recently spoke to this issue in *United States v. Mitchell*, wherein the statute in question stated that the United States is "to hold land . . . in trust for the sole use and benefit of the" allottee. 445 U.S. 535, 541, *rehearing denied*, 446 U.S. 992 (1980). Even in the face of such explicit language, the Court found that the Act created only a limited trust relationship between the United States and the Indians and did not impose any duty upon the Government to manage timber resources, absent language to the contrary. Therefore, the Court concluded that all of the fiduciary duties ordinarily placed by equity upon a trustee would not be imposed on the government. *Id.*

Similarly, in the instant action, this Court will not impose all of the obligations of a fiduciary relationship on the government solely on the basis of AIRFA.[5] To the extent that AIRFA imposes duties and obligations on the federal government with respect to Indian religious freedoms, the Court has already determined that the government has complied with the statute.

E. The National Environmental Policy Act

Plaintiffs allege that the Final Environmental Statement for the Arizona Snow Bowl Ski Area Proposal ("FES") is inadequate under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, because it fails to adequately address the environmental consequences of the proposed expansion with respect to: 1) endangered and threatened plant species; 2) Native American religion and culture; 3) the economy; 4) historic and cultural sites.

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[5]The plaintiffs also allege that several other statutes define a trust-based duty relevant to this case, however, the Court finds these to be inapplicable. *See* 25 U.S.C. §§ 13, 452, 1601; Treaty of 1850, 9 Stat. 9.74, ¶ I, XI.

NEPA requires the responsible federal official to include for the "major federal action significantly affecting the quality of the human environment" a "detailed statement" which analyzes "the environmental impact of the proposed action." 42 U.S.C. § 4332(c). Judicial review of administrative decisions in NEPA cases is a narrow one. The role of the Court is not to substitute its own judgment for that of any agency as to the environmental consequences of its proposed action, but only to insure that the agency has taken a "hard look" at those consequences. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The plaintiffs who challenge the adequacy of an FES have the burden of proof on all issues, and are required to establish by a preponderance of the evidence that the FES is inadequate, *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Circ. 1975). The detail required in the FES is only "that necessary to establish that an agency in good faith objectivity has taken a sufficient look at the environmental consequences of the proposed action and alternatives to that action." *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573, 576 (5th Cir. 1978). The Court's review of the adequacy of the FES is governed by a rule of reason:

> We are governed by a "rule of reason," *Carolina Environmental Study Group v. United States*, 166 U.S. App. D.C. 416, 418; 510 F.2d 796, 798 (1975), and our task is "to determine whether the [FES] was compiled with objective good faith and whether the resulting statement would permit a decision-maker to fully consider and balance the environmental factors." *Sierra Club v. Morton*, 501 F.2d 813, 819 (5th Cir. 1975).

Sierra Club v. Adams, 578 F.2d 389, 393 (D.C. Cir. 1978).

Upon review of the FES in the present case, the Court has determined that the plaintiffs have not met their burden of proof of inadequacy; the FES clearly sets forth sufficient information to enable the decision-maker to fully consider the

environmental factors involved and make a reasoned decision. The possible effect of the proposal on rare, threatened or endangered species,[6] Native American religious and cultural issues,[7] historic and cultural sites,[8] wilderness considerations,[9] human-caused fires,[10] insect and disease activity,[11] soil erosion[12] and the economy[13] are all discussed in sufficient detail in the FES. "An [FES] need not be exhaustive to the point of discussing all possible details bearing the proposed action . . . " *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

In addition, plaintiffs contend that the defendants failed to employ an interdisciplinary approach in preparing the FES. In fact, the FES was developed by an interdisciplinary team;[14] an archaeologist and several authorities on Hopi culture and religion were consulted regarding historic sites and native American religion and culture,[15] a wildlife biologist and botanist provided information concerning the rare species and Alpine Tundra environment,[16] and information was requested from Hopi and Navajo religious practitioners.[17]

Plaintiffs also contend that the FES is inadequate in that defendants have overestimated the benefit of the plan to the Flagstaff economy and have given insufficient weight to envir-

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[6] *See* FES at 45-47, 126-127, 130, 176-177.

[7] *See* FES at 57-62, 73, 132-133, 156, 159-160.

[8] *See* FES at 62-63.

[9] *See* FES at 51, 136.

[10] *See* FES at 126.

[11] *See* FES at 128-130.

[12] *See* FES at 130.

[13] *See* FES at 64-65.

[14] *See* FES at 209; Kirkpatrick Affidavit ¶ 10.

[15] *See* Pilles Affidavit ¶ 6; Kirkpatrick Affidavit ¶ 10; FES at 61.

[16] *See* Kirkpatrick Affidavit ¶ 11.

[17] *See* FES at 57-61, 159.

onmental values and in so doing have subordinated Native American religious interests to recreational and commercial interests. However, the Supreme Court has made it clear that in reviewing the adequacy of an FES, courts ought not to rebalance competing policies. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). A court may not substitute its judgment for that of the agency as to the necessity or desirability of the project in question. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1279-80 (9th Cir. 1973).

In sum, the Court has determined that the FES is adequate and that the agency took a sufficient look at the environmental consequences of its action and alternatives[18] to its action and therefore is in compliance with the applicable provisions of NEPA.

F. Endangered Species Act of 1973

Plaintiffs allege numerous violations of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531 *et seq.* The focus of the plaintiffs' complaint involves *Senecio Franciscanus*, the "San Francisco Peaks groundsel." Plaintiffs claim that this is a threatened species as defined in the ESA and that therefore the protections of section 7 of the Act, 16 U.S.C. § 1536, apply. The defendants, however, claim that because this plant is not "listed" pursuant to section 1533 of the Act, it is not entitled to the protections of section 1536 of the Act. Upon analysis of the statute and its legislative history, the Court finds that a species must be "listed" to be protected by the Act, and accordingly finds that the defendants were not required to comply with the procedures of the ESA.

Plaintiffs allege that numerous provisions of the ESA were violated. They first contend that the decision to develop the

[18] *See* FES at 16-17, 76-111, 123-141.

Snow Bowl constitutes a violation of 16 U.S.C. § 1536 (a) (1) which requires federal agencies to carry out programs "for the conservation of endangered species and threatened species *listed pursuant to Section 1533* (emphasis added)." Clearly, *S. Franciscanus* would have to be listed to fall within the ambit of this provision.

The plaintiffs' second allegation, which is the crux of their argument under the ESA, is that the defendants have violated section 1536 (a) (2) which reads:

> Each Federal Agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Plaintiffs claim that because the defendants never complied with this requirement of "consultation"[19] they have clearly violated the ESA. Defendants, however, again argue that because none of the plant species at issue have been "listed," the ESA does not apply and therefore the Forest Service was never legally bound to comply with this requirement of consultation with the Department of Interior.

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[19]There is evidence in the record that defendants did contact the U.S. Fish and Wildlife Service to perform assessments; however, then defendants did not comply with the requirements under 16 U.S.C. § 1536(b) that include a detailed written statement from the Secretary to the federal agency involved.

This presents a somewhat more difficult problem for the Court. Section (a) (2) does not expressly state that the endangered or threatened species must be listed pursuant to section 1533 of the Act, it merely states that if an agency's action will jeopardize the continued existence of *any* endangered species or threatened species, the consultation must occur. "Endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range other than [certain insects]." 16 U.S.C. § 1532 (b). "Threatened species" is defined as "any species which is likely to become an endangered species within the forseeable future throughout any or a significant portion of its range." 16 U.S.C. § 1532 (20). Because neither of these definitions requires that a plant be listed to be considered endangered or threatened, the defendants argue that section 1536 (a) (2) was meant to apply to any endangered or threatened species *whether it is listed or not.* While the Court finds their argument somewhat persuasive, it has determined, upon thorough analysis, that such an interpretation cannot stand.

Pursuant to 16 U.S.C. § 1533, "the Secretary of the Interior shall by regulation determine whether any species is an endangered species or a threatened species . . . " and then, pursuant to further requirements of the statute, formally list them. Clearly the Act intended that such a determination be left to the Secretary of the Interior, and therefore most of the references to "endangered" or threatened" species expressly specify "listed pursuant to section 1533 of this title." *See* 16 U.S.C. §§ 1532 (a) (1), (c) (1), (d). However, section (a) (2), by not expressly qualifying such species as "listed" has created an ambiguity. Apart from a very general definition of the terms "endangered" and "threatened," *see* 16 U.S.C. §§ 1532 (6), (20), there is no indication of how such a determination should be made, apart from the listing by the Secretary of the Interior. Nor is there any indication that Congress intended to leave such a determination to the courts. Accordingly, the Court

must look to the legislative history for guidance as to whether Congress intended that section 1536 (a) (2) should be read to include species that have not been officially listed under the express terms of section 1533 of the Act. The legislative history does not support such a conclusion.

The House Report for the 1978 amendment to the ESA states:

> The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened."

H. Rep. No. 1625, 95th Cong., 2nd Sess. 5 (1978). "The mandate of Section 7 applies once a species is listed." *Id.* at 7.

In addition, the House Conference Report for the 1979 amendments states:

> The conferees note that the purpose of a listing proposal is to determine whether a species is endangered or threatened and should be listed as such. *The protection of Section 7 [1536] should not apply until a species has been formally listed.*

H. Conf. Rep. No. 697, 96th Cong., 1st Sess. 13 (1979) (emphasis added).[20] Based on this language and the fact that Congress set forth no standards for a judicial interpretation of what constitutes an endangered or threatened species, this Court finds that a species must be listed by the Secretary of the Interior before the protective provisions of the ESA apply. Accordingly, because none of the species named by plaintiffs has been listed, the protections do not apply in this case.[21]

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[20] As plaintiffs point out, the statutory language in question here was included in the ESA in the 1978 amendments and the legislative history cited to by the defendants is the House Conference Report of the 1979 amendments. However, section 1536 (d) (2) is not changed by any language in the 1979 amendments, and the language is relevent as to Congress' intent that section 7 only apply to formally listed species; it does not go to any specific portion of the 1979 amendment.

G. National Wilderness Preservation System Act of 1964

Plaintiffs allege that defendants' authorization of the expansion of the Arizona Snow Bowl interferes with the statutory authority of the President and Congress to recommend and designate, respectively, areas as "wilderness" under the Wilderness Act of 1964, 16 U.S.C. §§ 1131 *et seq.* Specifically, plaintiffs allege that the defendants have violated 16 U.S.C. § 1132 (b), which allows the President to recommend for inclusion in designated "wilderness" areas, lands contiguous to areas formerly designated as "primitive" by the Secretary of Agriculture. They claim that the decision to permit expansion deprives the Secretary of his discretion to designate the permit area as "wilderness." Defendants, on the other hand, contend that because the land on the San Francisco Peaks was not previously classified as "primitive" and because the permit area is not "predominantly of wilderness value," section 1132 (b) does not apply here. The court agrees that the plaintiffs' claim must fail.

Although a substantial amount of land adjacent to the Arizona Snow Bowl permit area has been recommended by the Secretary of Agriculture and the President for wilderness designation, the permit area was specifically not included due to the

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[21]The plaintiff Navajo Medicinemen's Association, in their opposition to defendants' motion for summary judgment, alleges that if the Court should find that a species must be "listed" to invoke the protection of the ESA, equity should require the defendants to treat *S. Franciscanus* as if it were formally listed as threatened because of: 1) assurances in the FES that the plant would be given full consideration under the Act; and 2) the reason the plant is not now formally listed is due to unreasonable delay on the part of the Secretary of the Interior.

The Court will not extend equity principles this far; it is the Department of Interior who makes a determination as to whether a species should be listed, not the Forest Service. Therefore, the FES is not determinative of whether a species should be given protection under the Act. Secondly, there is insufficient evidence to support the theory of unreasonable delay substantial enough to require the Court to force the defendants to "list" this species.

various man-made disturbances that have already occurred there. *See* Peterson Affidavit ¶¶ 9-10, 12; FES at 6, 51. None of the recommended land was previously designated "primitive" or "wilderness." *See* Peterson Affidavit ¶ 5. Plaintiffs claim that no further development should occur on the permit area because it is contiguous to an area proposed for designation and therefore the President and Congress have discretion to eventually include this land as wilderness under 16 U.S.C. § 1132 (b). However the statute clearly states that "nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of *primitive areas* or recommending the addition of any contiguous area of national forest lands *predominantly of wilderness value.*" 16 U.S.C. § 1132 (b) (emphasis added).

Plaintiffs rely on the case of *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), which enjoined the Forest Service from the sale of timber proposed to be cut from national forest land because it would deprive the President and Congress of their discretion to designate it as wilderness. However the case is easily distinguishable and serves to reinforce the defendants' position. The National Forest land in *Parker* was contiguous to a designated "primitive" area and therefore fell within the ambit of 16 U.S.C. § 1132 (b). Secondly, the contiguous land in *Parker* was found to meet the "minimum requirements of suitability for wilderness classification" which is defined by the Wilderness Act as:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where earth and its community of life are untamed by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or habitation, which is protected and

managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic or historical value. 16 U.S.C. § 1131 (c).

The permit area land which is at issue in the instant action clearly does not fall within this definition. At the time when the President recommended adjacent lands for wilderness designation,[22] there was a ski lodge, ski runs, all of which necessitated the clearing of trees. The land is not "an area of undeveloped Federal land retaining its primeval characteristics and influence, without permanent improvements or human habitation" and "without the imprint of man's work."

Accordingly, because the adjacent land which has been recommended for wilderness designation is not "primitive" and because the permit area is not land "predominantly of wilderness value," the plaintiffs' claim under section 1132 (b) must fail.

H. Multiple-Use Sustained-Yield Act of 1960

The plaintiffs herein allege that the defendants have abused their discretion under the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528, which declares that "the

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[22]Even if section 1132 (b) were to apply, the fact that the President has already considered this area for wilderness status and chose not to include the permit area is also an indication that his statutory discretion would not be interfered with by this proposal.

national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes," and section 529 which states that "the Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom . . . due consideration shall be given to the relative values of the various resources in particular areas." Plaintiffs assert that the Forest Service acted arbitrarily in approving the proposed expansion and by favoring the Flagstaff economy and recreation over religious significance and other uses. This argument must fail.

The decision as to the proper mix or uses in any given area is left to the sound discretion and expertise of the Forest Service. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971). Courts have declined to involve themselves in the executive decision making absent a showing that the decision is arbitrary, capricious or an abuse of discretion. As the Court of Appeals for the Ninth Circuit stated in declining to review a Forest Service decision:

> this Court has neither the technical expertise nor the intuitive knowledge gained from daily acquaintance with this subject to provide an informed review of executive decision making.

Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 455 (9th Cir. 1971).

MUSYA does not require that all uses will exist in a forest, or that all uses will exist in equal amounts. The record demonstrates that other multiple uses exist in the San Francisco Peaks, including grazing, timber cutting, water and energy delivery systems, communication facilities and wildlife protection. *See* Kerrick affidavit ¶ 9. In addition, the Forest Service considered the religious significance of the Peaks and determined that the religious practices of the Native Americans were compatible with the other multiple uses of the Peaks and the minor expan-

sion for recreational purposes *within* the 777 acre permit area. The San Francisco Land Use Plan approved on July 23, 1974, specifically designates the Snow Bowl area for recreational purposes. *See* FES at 160.

Accordingly, the Court finds that the defendants did not act arbitrarily pursuant to its MUSYA obligations in approving the expansion of the Snow Bowl facilities.

I. National Historic Preservation Act and Executive Order 11593

Plaintiffs contend that the defendants have failed to comply with the requirements of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the regulations promulgated thereunder, 36 C.F.R. §§ 800 *et seq.*, for two reasons. First, they contend that in approving expansion of skiing and recreational activities and in widening the Snow Bowl road, defendants violated the provisions of the Act with respect to two National Register properties in the vicinity of the permit area. Secondly, plaintiffs contend that defendants did not comply with the Act concerning the eligibility of the San Francisco Peaks themselves for inclusion in the National Register. Defendants, on the other hand, contend that formal compliance was not yet required under the Act but will be done before approval of any construction. They claim that an informal determination that the two registered properties in the vicinity of the permit would not be affected either directly or indirectly was sufficient. They also claim that the Peaks themselves are ineligible for listing on the National Register and therefore are not entitled to the protections of the Act.

Section 470a of the NHPA authorizes the Secretary of the Interior "to expand and maintain a national register of districts, sites, buildings, structures and objects significant in American History, architecture, archaeology and culture" known as the National Register and establishes the Advisory

Council on Historic Preservation. In addition, 16 U.S.C. § 470f provides that:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.[23]

"Undertaking" is defined as "any Federal, federally assisted or federally licensed action, activity or program or the approval, sanction, assistance or support of any non-Federal action, activity or program . . . " 36 C.F.R. § 800.2 (c). Defendants construe "undertaking" to mean the actual site-specific construction plan for the preferred alternative and not the FES. Thus

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[23]Similarly, Executive Order 11593 provides that the federal government "shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the nation." Section 2 of the Order provides that the heads of federal agencies shall cooperate with the Secretary of the Interior and the State Historic Preservation officer in locating sites which appear to qualify for listing on the National Register of Historic Places. During the interim period when potential sites are being evaluated and located, caution is required to insure that federal properties which may qualify for nomination are not altered or destroyed. Any questionable actions are to be referred to the Secretary of the Interior for an opinion concerning the property's eligibility in the National Register based on consultation with the State Historic Preservation Officer. *See* 3 C.F.R. 559.

they assert that the formal determination of effect and the formal consultation with the State Historic Preservation Officer were not performed as of the FES stage but will be done before approval of any construction. Plaintiffs contend that the decision to approve the expansion falls squarely within the definition of an "undertaking" and pursuant to 36 C.F.R. § 800.4 "as early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any agency action that would foreclose alternatives of the council's ability to comment, the Agency official shall take the steps set forth in 36 C.F.R. § 800.4 (a)-(e). The Court agrees with the plaintiffs and accordingly finds that the relevant portions of 36 C.F.R. §§ 800 *et seq.* should have been complied with prior to the Agriculture Department's authorization of the plan.

Subsections (1) - (4) of 36 C.F.R. § 800.4 (a) clearly place an affirmative duty upon the responsible agency official to identify properties listed on the National Register, or eligible for inclusion which have not been listed that exist within the area of the undertaking's potential environmental impact. Then the federal official, in consultation with the State Historic Preservation Officer, must determine "whether the undertaking will have an effect upon this historical, architectural, archaeological or cultural characterstics of the property that qualified it to meet National Register Criteria. 36 C.F.R. § 800.3 (a). If the agency official, in consultation with the State Historic Preservation Officer, finds that the undertaking will not affect these characteristics, it may proceed provided that the Agency official shall document each determination of no effect, which shall be available for public inspection.

Plaintiffs submit that in approving the expansion, the defendants violated NHPA, Executive Order 11593 and the foregoing regulations with respect to two National Register properties; the C. Hart Merriam Base Camp, located several miles northwest of the project area, and the Fern Mountain Ranch, owned by

plaintiffs Wilson and located 2 miles north of the project area. The Court agrees.

The Forest Service apparently did consider these two historic sites and determined that the proposed plan would have "no effect" on them. *See* FES p. 62-63. The Forest Supervisor determined that no impact would occur and the project was not given any further NHPA evaluation. However, the regulations clearly require consultation with the State Historic Preservation Officer as well as a written documentation if "no effect" is found. 36 C.F.R. § 800.4 (4) (b) (1). There is no evidence in the record that the defendents complied with these regulations. Accordingly, the project cannot be sanctioned until such compliance occurs.

In addition, plaintiffs allege that the mountains themselves should be considered as eligible. Defendants did not consult with the Secretary of the Interior or the State Historic Preservation Officer or the Advisory Council concerning the eligibility of the San Francisco Peaks for inclusion in the National Register based on the claim that because the mountains are a property used for religious purposes, they are not eligible for inclusion in the National Register pursuant to 36 C.F.R. § 1201.6. However, that provision specifically provides that "religious property" which derives "primary significance" from its "historical importance" is eligible for inclusion in the National Register. The Court finds, therefore, that the Forest Service should have consulted with the State Historic Preservation Officer to determine if the Peaks themselves are eligible for inclusion in the National Register. 36 C.F.R. § 800.4 (a) (1). Because there is no evidence in the record that this has been done, the Court will remand this matter to the Forest Service for full compliance with NHPA and the applicable regulations.

J. The Permits for the Arizona Snow Bowl

Plaintiffs contend that the defendants have no authority to allow the use of the entire 777 acre tract of land under permit for recreational purposes. Essentially, they are challenging a dual permit device that is used as a means of avoiding an eighty acre recreation and resort limitation imposed by 16 U.S.C. § 497. Defendants contend that the dual permit system is a valid exercise of authority pursuant to the two authorizing statutes in question. The Court agrees with the defendants and accordingly upholds the use of dual permits.

The Forest Service has issued two permits to Northland Recreation which cover a total of 777 acres. One of the permits is an annual or revocable permit which covers 757 acres; the other is a term permit for the period of 20 years covering 20 acres. The revocable permit was issued pursuant to broad authority granted to the Forest Service by the Organic Act, 16 U.S.C. § 551, which gives the Secretary of Agriculture the authority to "make such rules and regulations . . . as will insure the objects of such regulations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." Term special use permits are issued under the Act of March 4, 1915, as amended, which provides in pertinent part, that the Secretary of Agriculture:

> is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts and any other structures or facilities necessary or desireable for recreation, public convenience, or safety . . . (c) to permit the use and occupancy of suitable areas of land within national forests, not exceeding eighty acres and for a period not exceeding thirty years, for the purpose of constructing and maintain-

> ing buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses of the national forests.

16 U.S.C. § 497.

Plaintiffs allege that the 1915 Act limits the defendants' authority to issue recreational permits for areas exceeding eighty acres. Defendants, however, claim that the plain language of the 1897 Act establishes the authority to promulgate regulations requiring permits to occupy and use national forest lands under terms and conditions which he deems proper, and that there is no indication that the 1915 Act was meant to limit that authority, either on the face of the statute or in the legislative history.

In looking to the legislative history of the 1915 Act, there is no explicit approval of the combined use of term and revocable permits.[24] However, when the Act of 1915 was amended in 1956,[25] the House Agriculture Committee Report stated that Congress did not intend to limit the Secretary's broad authority to issue revocable permits under the 1897 Act but instead wanted to broaden his authority to issue term permits under the 1915 Act:

> The Department of Agriculture now has adequate authority to issue revocable permits for *all purposes* under the Act of June 4, 1897 (16 U.S.C. § 551). Its authority to issue term permits . . . would be broadened by S. 2216.

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[24] As discussed in the legislative history of the 1915 Act, the reason for establishing a term permit was to insure adequate financing for privately-built improvements on Forest Service land. *See* H. Rep. No. 1255, 63rd Cong. 3rd Sess. 14 (1914).

[25] The 1915 Act was amended by the Act of July 18, 1956, to increase allowable acreage from five to eighty acres and to expand the purposes for which term permits could be granted to include commercial development. 70 Stat. 708.

H. Rep. No. 2792, 84 Cong. 2d Sess. (1956) (emphasis added). There is no indication in the legislative history that Congress intended to limit the authority under the 1897 Act to issue revocable permits for recreational use. In addition, as defendants point out, "under some circumstances, Congressional failure to repeal or revise [a statute] in the face of administrative interpretation has been held to constitute persuasive evidence that the interpretation is one intended by Congress." *Zemel v. Rusk*, 381 U.S. 1, 11 (1956). Presently the Forest Service has permitted the use of some 150 recreational ski facilities by virtue of this dual permit system, and there is no evidence of Congressional disapproval.

The Ninth Circuit Court of Appeals confronted this dual permit system in the case of *Sierra Club v. Hickel*, 433 F.2d 24, 34-36 (1970). The Court held that the use of term and revocable permits by the Secretary of Agriculture in connection with a large-scale recreational facility would not amount to an impermissible exercise of administrative authority.[26] Based on an exhaustive legislative history, the Court found that the 1956 amendment to the 1915 Act increased the Secretary's term permit authority and did not limit his power to issue revocable permits or combine the use of term and revocable permits:

> It seems apparent, as was obvious to both Senate and House Committees, that the eighty acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals could be placed upon lands held under revocable permits. We find no indication in those reports that ski lifts are limited to term permits.

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[26]This decision was affirmed only as to the standing issue in *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other question and we intimate no views on the merits of the complaint.").

433 F.2d at 35.

Plaintiffs claim that decision is not binding or persuasive authority and rely instead on the case of *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973). In that case, the plaintiffs argued that the issuance of rights-of-way and special land use permits by the Secretary of the Interior for construction of the Alaska pipeline would violate section 28 of the Mineral Leasing Act of 1920 by exceeding explicit limitations of that section. The Court found for the plaintiffs based on a finding that the language of the statute indicated that it was to be exclusive authority for rights-of-way in the transportation of oil The plaintiffs also alleged that the permit violated the eighty acre limitation of 16 U.S.C. § 497, to which the Court responded that "the statute involved in that case . . . has no provision comparable to that in Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." 479 F.2d at 870.

Similarly, there is no provision in 16 U.S.C. § 497 that states that no recreational permits shall be granted except under the provisions, conditions and limitations of the statute. Nor is there any indication that the statute was intended to repeal the broad authority granted under the 1897 Act. Neither statute is exclusive, either by actual terms or discernible intent, as to the Secretary's authority concerning recreational permits, and it is well-settled that repeals by implication are not favored and in order to do so "the intention of the legislature to repeal must be 'clear and manifest.' " *Watt v. State of Alaska*, 49 U.S.L.W. 4433, 4435 (U.S. April 21, 1981). Accordingly the Court agrees with the Ninth Circuit's finding in *Sierra Club v. Hickel* that the dual permit system is a valid exercise of agency authority.

K. The Administrative Procedure Act

Plaintiffs contend that the Forest Service has violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, because the agency action was arbitrary, capricious and an abuse of discretion.[27] Plaintiffs specifically allege that the record clearly discloses bias and prejudice on the part of the Forest Service in favor of further commercialization of the San Francisco Peaks. Plaintiffs cite to: 1) a letter from the District Ranger to the permittee which allegedly attempts to assist the permittee in arguing for public support; 2) two matrices in which the Forest Service calculated the impacts of various plans that allegedly favored development; 3) the FES and Decision of the Chief Forester which allegedly fail to provide legally sufficient justifications for the selection of the preferred alternative and ignored indications of harm to Indian religious beliefs and practices; 4) a letter from Senator DeConcini to Peterson, the Regional Forester, urging development of the project and thanking him for his mutual cooperation. All of these items, plaintiffs urge, indicate a wholly arbitrary and unjustified weighing of factors and an abuse of agency discretion, and therefore, plaintiffs contend that the actions of the Forest Service should be held unlawful and set aside pursuant to the APA. The Court finds no such violation.

The "arbitrary and capricious" standard of review is a narrow one which precludes the Court from substituting its own judgment for that of the agency, or from inquiring into the mental processes of the administrative decisionmakers.

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[27]This is in addition to their contentions throughout that the action of the Forest Service in authorizing the "preferred alternative" was contrary to its constitutional power and in excess of its statutory authority. The matters discussed in the previous sections are challenged under the APA as well as those independent statutes.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 420 (1971). The standard presumes that the agency action is valid, and the Court must find only that the action was based on a consideration of the relevant factors. *Id.* at 416. We find that the decision in this matter was based on such a consideration despite plaintiffs' references to limited portions of the record.

Plaintiffs claim that the decision was biased heavily in favor of further commercialization of the San Francisco Peaks, yet the alternative selected by the Forest Service severely limited the amount of development proposed by the permittee. *See* FES at 7-8, 10. Additionally, there is much information included on the subject of Indian religious beliefs and the consideration of such beliefs in rendering this decision. Furthermore, there is no indication that the Chief Forester premised his decision on anything other than the merits of the case, or that a letter on Congressional stationery urging an expedited decision and expressing the Senator's view constituted undue congressional influence. *See D.C. Federation of Civil Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972).

In short, the Court finds that the plaintiffs have not made a showing of bias or prejudice sufficient to compel the Court, pursuant to the APA, to find this decision to be arbitrary and capricious.

L. Conclusion

Accordingly, in light of the above analyses and pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court grants summary judgment to the defendants on all counts except for the claim under the National Historic Preservation Act. On that issue, the Court remands this matter to the Department of Agriculture for compliance with the NHPA and the regulations promulgated thereunder. Pursuant to 36 C.F.R. § 800.4(e), all activity on this project is suspended until the Act has been complied with.

An Order in accordance with the foregoing has been issued as of the date below.

Charles R. Richey
United States District Judge

Dated: June 15, 1983
At 1:43 p.m.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

HOPI INDIAN TRIBE,

Plaintiffs

v.

JOHN R. BLOCK, *et al.*,

Defendent.

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, *et al.*,

Defendant.

Civil Action No. 81-0558

RICHARD F. WILSON and JEAN WILSON,

Plaintiffs,

v.

JOHN R. BLOCK, *et al.*,

Defendant.

ORDER

Upon consideration of the entire record herein, and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 12th day of June, 1981, hereby

ORDERED that the defendants' motion to dismiss the Wilson plaintiffs' complaint as to the First Amendment and AIRFA claims be, and the same hereby is, granted; and it is

FURTHER ORDERED that the intervenor-defendant's motion to dismiss the Wilson plaintiffs' complaint for failure to exhaust administrative remedies be, and the same hereby is, denied; and it is

FURTHER ORDERED that the plaintiffs' motions for summary judgment be, and the same hereby are, denied; and it is

FURTHER ORDERED that the defendants' motion for summary judgment be, and the same hereby is, granted on all counts except the claims under the National Historical Preservation Act as set forth in Count III of the Hopi Tribe's complaint and Count II of the Wilsons' complaint; and it is

FURTHER ORDERED that as to Count III of the Hopi Tribe's complaint and Count II of the Wilsons' complaint this case shall be, and the same hereby is, remanded to the Secretary of Agriculture for further proceedings in accordance with the Memorandum Opinion issued of even date herewith, or as soon thereafter as can be typed and proofread.

Charles R. Richey
United States District Judge

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APPENDIX "C"

OPINION AND ORDER
Dated May 14, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

THE HOPI INDIAN TRIBE,

Plaintiff,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

Defendants.

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

Defendants.

Civil Action No. 81-0558

RICHARD F. WILSON, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

Defendants.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This matter is before the Court of defendants' motion for entry of final judgment, plaintiff Hopi Indian Tribe's Rule 60(b) motion, and plaintiff Navajo Medicinemen's Association's motion for relief from judgment pursuant to Rule 59(e) and Rule 60(b). The Court, upon consideration of these motions, the oppositions thereto, and the entire record herein, has determined that the defendants' motion for entry of final judgment should rightfully be granted and that the plaintiffs' motions for relief should be denied for the reasons as set forth herein.

History of Litigation

Plaintiffs in this action initially filed complaints seeking injunctive, declaratory and mandamus relief in order to prevent defendants from authorizing the further expansion of recreational facilities at the Arizona Snow Bowl in the Coconino National Forest in Arizona. The Hopi and Navajo plaintiffs were seeking removal of the existing facilities at the site as well. Plaintiffs alleged a violation of the Free Exercise Clause of the First Amendment, the American Indian Religious Freedom Act, the National Environmental Policy Act, the Endangered Species Act, the Wilderness Act, the Multiple Use-Sustained Yield Act, the National Historic Preservation Act, the statutes governing the issuance of permits, a trust responsibility between the federal government and the Indian Tribes and the Administrative Procedure Act.

On June 15, 1981, this Court entered a Memorandum Opinion granting summary judgment to the defendants on all counts except for the claim under the National Historic Preservation Act. On that issue, this Court remanded the matter to the Department of Agriculture for compliance with the National

Historic Preservation Act (NHPA) and the regulations promulgated thereunder. Development of the facilities was suspended pending such compliance.

Defendants are now before the Court seeking entry of final judgment. They claim that they have now fully complied with the NHPA and that accordingly the Court may enter final judgment for the defendants and the project may continue.

Plaintiffs, however, in addition to opposing the motion for entry of final judgment, are before the Court on a Rule 60(b) motion and a Rule 59(e) motion. They claim that there is new evidence that has been discovered which would alter this Court's decision of June 15, 1981, and accordingly seek judgment in their favor.

Motion for Entry of Final Judgment

This Court, in its opinion dated June 15, 1981, found that the defendants had not consulted with the State Historic Preservation Officer (SHPO) or provided written documentation as required by the statute and regulations. The Court also held that the defendants had not consulted with the SHPO concerning the eligibility of the San Francisco Peaks themselves for inclusion in the National Register of historic properties.

The Court finds that the defendants have now complied with the Order of June 15th. They have defined the area of the proposed undertaking's potential environmental impact, attempted to identify eligible properties that may be affected by the project, consulted with the SHPO as to the effect of the undertaking on two listed properties in the region, and have considered the eligibility of the San Francisco Peaks for National Register listing. The Court finds there to be no abuse of discretion on the part of the Forest Service as to any of these determinations. The SHPO concluded with the Forest Service's finding that the proposed project will have no direct or indirect effect on the factors which qualified the two listed properties

for inclusion in the National Register, and the Court finds nothing in the record which merits rejecting this determination.

As for the determination regarding the eligibility of the Peaks themselves for inclusion, the plaintiffs claim that because a "question" exists as to whether the Peaks are eligible, the defendants are required to have the "question" resolved by the Secretary of the Interior pursuant to 36 C.F.R. § 800.4 (a) (3). However, the regulations clearly state that "a question . . . exists when the agency and the State Historic Preservation Officer disagree or when the agency determines that a question exists." 36 C.F.R. § 1204.2(c). In this case, the Forest Service and the SHPO agree that the San Francisco Peaks as an entity are not eligible for listing on the National Register and the Forest Service had not otherwise determined that a question exists. Clearly there was no obligation to refer the matter to the Secretary of the Interior; the regulation was obviously intended to provide a means of either resolving a dispute or providing a further determination should the agency find it necessary.

The plaintiffs also challenge the substance of the Forest Service's finding that the Peaks are ineligible for inclusion in the National Register. They cite to several other mountains that have been listed and argue that the Forest Service acted in an arbitrary and capricious manner in exercising its discretion as to this matter.

However, as the defendants point out, what qualifies an area for listing is a combination of unique attributes which in this instance the Forest Service did not find to be present. The regulations provide that properties "used for religious purposes" ordinarily should not be listed in the National Register unless they are "(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance . . . [or] (f) a property primarily commemorative in intent if design, age, tradition or symbolic

value has invested it with its own historical significance." 36 C.F.R. § 1202.6.

The defendant did not find the Peaks, as an entity, to fit into any of the exceptions, nor did they find the Peaks to fall within any of the categories of properties eligible for inclusion in the National Register set forth in 36 C.F.R. § 1202.6 (districts, sites, buildings, structures and objects). The administrative determination here is of course entitled to great deference:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Udall v. Tallman, 380 U.S. 1, 16-17 (1965). There is no evidence that this discretion has been abused and accordingly the Court will not disturb it.

Rules 59(e) and 60(b) Motions

Plaintiffs have moved, pursuant to Rules 59(e) and Rule 60(b), to have this Court modify its Order of June 12, 1981, with respect to plaintiffs' claims under the First Amendment, the American Indian Religious Freedom Act, the National Environmental Policy Act, the alleged trust duty owed by the defendants to the plaintiffs, and the Endangered Species Act.

In order to succeed in modifying a previous judicial rule pursuant to Rule 60(b), the plaintiff has a very heavy burden to meet. They must

(1) show that the "newly discovered evidence" was not and would not by due diligence have been discovered in time to produce it at trial;

(2) show that the alleged "newly discovered evidence" would not merely be cumulative; and

(3) show that the "newly discovered evidence" would probably lead to judgment in the movant's favor.

Philippine National Bank v. Kennedy, 295 F.2d 544, 545 (D.C. Cir. 1961). Plaintiffs herein claim that pursuant to a deposition which was taken of Forest Service Archeologist Peter Pilles, they have "newly discovered evidence" regarding fir bough collecting on the San Francisco Peaks near the Snow Bowl road, as well as an alleged Hopi Shrine located in the vicinity of Agassiz Peak outside the Snow Bowl permit area. Plaintiffs argue that this information was not revealed to them prior to the Court's ruling on June 12, 1981, and that they are now entitled to judgment in their favor based upon this new evidence. The Court disagrees for several reasons.

First, the Court is not convinced that this constitutes "newly discovered evidence" in light of the fact that the federal defendants have recognized from the outset of this action that bough collecting practices occur in the fir zone of the San Francisco Peaks including the west side. *See* Levy affidavit submitted with defendants' cross-motion for summary judgment ¶ 11. Additionally, federal defendants have stipulated to the existence of Hopi shrines throughout the San Francisco Peaks. *See* Joint Stipulation of Material Facts No. 26.

Secondly, even if plaintiffs did not previously know of these specific sites, it could easily have been discovered by plaintiffs prior to the Court's ruling on June 12, 1981. Who should know better where Indian religious sites exist than the plaintiffs themselves? The plaintiffs apparently did not engage in any discovery on this issue prior to the Court's summary judgment ruling, and they specifically agreed to the resolution of this case on the merits based on written submissions. If, in fact, there were areas that the plaintiffs considered "sacred" that should have been brought to the Court's attention, clearly the plaintiffs

could have obtained that information through due diligence. The burden of proof is not on the defendant to show an absence of religious sites, but is on the plaintiffs to show the presence of such and the resulting burden on their religious practices. Plaintiffs did not meet this burden when they were previously before the Court and, therefore, they will not be allowed to relitigate the issue at this point.

Thirdly, the revelation of this "new evidence" would not alter the Court's decision regarding the First Amendment or American Indian Religious Freedom Act claims. This Court concluded in its June 15, 1981 Memorandum Opinion that the expansion of the Arizona Snow Bowl would impose no burden on the practice of plaintiffs' religion. The Court held that the defendants had not forced plaintiffs "to embrace any religious belief or to say or believe anything in conflict with their religious tenets; nor have they forced plaintiffs to choose between their religious beliefs and some public benefit." Memorandum Opinion at 9. The fact that there are two bough collecting sites, which appear to be temporary in nature, within 70-100 feet of the Snow Bowl access road, does not make this permit area central or indispensible to the practice of plaintiffs' religion. Additionally, as the Court previously pointed out, plaintiffs can still collect fir boughs in these areas should they chose to do so; the Snow Bowl operation had been in existence for nearly fifty years and it appears that the plaintiffs' religious practices and beliefs have managed to coexist with the diverse development that has occurred. As long as the Indians have continued access to the Peaks, the Snow Bowl will not impinge upon the continuation of all essential ritual practices. *See* Memorandum Opinion at 9.

The plaintiffs also attempt to have the Court alter its judgment pursuant to the National Environmental Policy Act (NEPA), the alleged trust responsibility and the Endangered Species Act (ESA) claims. However, the Court finds these arguments to be repetitious and will not engage in a restatement of

its previous decision. The qualifications of Mr. Pilles were known to the Court prior to its ruling and do not merit the Court altering its determination under NEPA. Similarly, the decision on remand in *United States v. Mitchell*, 664 F.2d 265 (Ct. Cl. 1981) in no way changes this Court's determination that no special trust responsibility exists by any treaty, statute or executive order in this case where the land in question is part of the National Forest system. Thirdly, this Court's holding that a species must be "listed" to be protected by the ESA is not altered by the fact that *Senecio Francisco* may be listed in the future; the plaintiffs may not invoke the protections of the Act until such a listing occurs.

In viewing of the foregoing, the Court finds that the plaintiffs have not met their burden of proof under Rule 60(b) or Rule 59(e). The Court will not engage in a restatement of its ruling on June 12th which plaintiffs are obviously encouraging the Court to do. Accordingly, the plaintiff's motions must be denied.

An Order in accordance with the foregoing shall be issued of even date herewith.

Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

THE HOPI INDIAN TRIBE,

Plaintiff,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

Defendants.

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

Defendants.

Civil Action No. 81-0558

RICHARD F. WILSON, *et al.*,

Plaintiffs,

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*

Defendants.

ORDER

Upon consideration of the defendants' motion for entry of final judgment and the plaintiffs' motions for relief from judgment and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 14th day of May, 1982, hereby

ORDERED that the defendants' motion be, and the same hereby is, granted; and it is

FURTHER ORDERED that the plaintiffs' motions be, and the same hereby are, denied; and it is

FURTHER ORDERED that final judgment be, and the same hereby is, entered for the defendants; and it is

FURTHER ORDERED that the injunction which was issued in this action be, and the same hereby is, removed.

Charles R. Richey
United States District Judge

APPENDIX "D"

Forest Supervisor's Decision
Dated February 27, 1979

RECORD OF DECISION

Arizona Snow Bowl Ski Area Proposal
and
Snow Bowl Road

Final Environmental Statement
03-04-78-01

Coconino County, Arizona

USDA – Forest Service
Coconino National Forest

The basic decisions are:

1. Whether to remove the Snow Bowl Ski Area facilities or to continue operation and allow further development within the Snow Bowl permit area.

2. Select a standard of improvement for the Snow Bowl Road.

The Forest Service devised the preferred alternatives for the Arizona Snow Bowl and Road based on the following considerations.

Legal Requirements

A Draft Environmental Statement filed on June 23, 1978, and a Final Environmental Statement, when filed with the Environmental Protection Agency, will fulfill the requirements of the National Environmental Policy Act of 1969 to use an interdisciplinary approach with public involvement in making this decision.

The American Indian Religious Freedom Act signed on August 11, 1978, by President Carter, states it shall be the policy of the United States to protect and preserve for American Indians, their inherent right of freedom to believe, express, and exercise their traditional religions. This includes, but is not limited to, access to sites; use and possession of sacred objects; and the freedom to worship through ceremonials and traditional rites. The Act directs evaluation of policies and procedures in consultation with native traditional leaders.

The Act does not require that access to all publicly owned properties or sites be provided without consideration of other existing or potential uses or activities; nor does it require that native traditional religious considerations always prevail to the exclusion of all other considerations. Traditional Indian religious practices will be allowed within the Snow Bowl permit area.

The Forest Service has met the requirement of consultation with native traditional religious leaders. In the preparatory stage of the Draft Environmental Statement, the public, including tribal leaders and native traditional religious leaders, were notified of all public involvement activities and invited to provide input. Public meetings, many scheduled specifically to encourage input from tribal leaders and native traditional religious leaders, allowed oral statements. Written statements were also encouraged. Traditional leaders who wrote to the Forest Service or presented oral statements identified an issue concerning Indian religious freedom and provided substantive background information on the traditional Indian religious practices within the San Francisco Peaks area.

The principal issue raised by Native American traditional religious leaders is that some of their supernatural beings live in the sacred mountains and have given the Indian people responsibility to protect their home from destruction. Traditional religious leaders believe that if they do not protect the sacred mountains, the supernatural beings will not look favorably on the people and natural disasters will result. The position of most Native American traditional religious leaders is that all land uses on the sacred mountains that are commercial or require construction, should be removed.

The legal requirements of the National Environmental Policy Act of 1969, the American Indian Religious Freedom Act and other laws, have been met.

Public Sentiment

There is intense public sentiment for both development and removal of the Snow Bowl facilities. During the public review period for the Draft Environmental Statement, the Forest Service recieved 1,360 inputs including 104 oral statements and 1,256 written statements representing 8,841 people. Overall, 76 percent of the people who responded favored development;

12 percent favored removal; 2 percent favored leaving the area "as is"; and 10 percent did not express an opinion.

Individual letters most frequently favored development. Of the 1,113 people who signed individual letters, 55 percent favored development, 17 percent favored removal, 14 percent favored leaving the area "as is", and 14 percent did not express an opinion.

The majority of people who commented seemed to take a polarized view. The issue was debated by many from a viewpoint of "growth versus no growth" of the Flagstaff community. People favoring no development used environmental effects and the traditional Indian religion as a point of debate. People who favored development showed concern for the economy of Flagstaff and the continuance of recreational skiing.

The Snow Bowl Road was mentioned by 5 percent of the people providing input. Road C was favored most frequently.

The predominance of total public input shows the public favors development.

Environmental Effects

The review of environmental factors, including snowfall, indicates the Snow Bowl permit area is a suitable place to provide a quality skiing experience. Environmental effects of new clearing for ski runs on the upper slopes would be difficult to mitigate. Of special concern is protection of proposed threatened and endangered plants, the alpine tundra above the ski area, and minimization of adverse visual effects. A level of development beyond what exists now can be accomplished with environmental impacts mitigated to an acceptable level by close attention to design, construction, and maintenance requirements.

Effects on Local Economy

There would be a one time cost to the Federal Government of about $700,000 if the existing facilties were to be removed. The Flagstaff area community would lose between $300,000 and $1,500,000 annually in total direct expenditures based on the last five year skier days if the facilities were removed.

Economic effects of removing the facilities are unfavorable to Flagstaff.

Direct annual expenditures in the Flagstaff community would be between $581,000 and $2,099,000 depending upon the level of development permitted. Direct annual employment at the Snow Bowl would be between 121 and 374 jobs. Direct spending for construction of new Snow Bowl facilities would be between $492,000 and $1,310,000.

Economic effects of development are considered a benefit to Flagstaff.

Forest Service Plans and Policies

The San Francisco Peaks Land Use Plan, approved July 23, 1974, allocates the Snow Bowl permit area to winter sports development.

The Final Environmental Statement for the San Francisco Peaks Land Use Plan, filed December 1, 1972, documents plans for the Snow Bowl Road to be two lane, all-weather surfaced.

It is Forest Service policy to provide a variety of quality recreation opportunities, including skiing, on suitable sites. Quality skiing includes a balance of slope distribution for beginner, intermediate, and advanced skiers; and a balance of facilities including lifts, lodge, and parking.

The proposed development of the Arizona Snow Bowl for skiing would implement previous planning and is consistent with Forest Service policy.

Preferred Alternatives

After considering all effects, the Forest Service prefers development because legal requirements have been met; public sentiment favors development; environmental effects can be mitigated; it benefits the local economy; and is consistent with Forest Service plans and policies.

The Forest Service finds it possible, by upgrading ski lift capacity, to accommodate a comfortable carrying capacity of 2,825 skiers while achieving a balance of facilities and slopes with significantly less disturbance to the environment than the proposed Master Concept Plan.

The Forest Service recognizes that to some, development will be considered adverse to Native American religious beliefs because commercial use and construction are not consistent with protecting the home of their supernatural beings; however, the Forest Service finds public use of the Snow Bowl area and the goods and services the public derives from the San Francisco Peaks area are a substantial and compelling reason for continuance and improvement of the development. The Forest Service will not deny access to sites or prevent use and possession of sacred objects; and will allow American Indians the freedom of worship, through ceremonials and traditional rites, within the Snow Bowl permit area.

The Forest Service has recommended the undeveloped portion of the San Francisco Peaks area, which includes about 14,650 acres or approximately one-fourth of the San Francisco Peaks, be designated a component of the National Wilderness Preservation System. This area of land will remain undeveloped, retaining its primeval character with the influence of man's work substantially unnoticeable.

The Forest Service has decided on a level of development which must respond to the following guidelines:

1. Each improvement must be analyzed using the environmental assessment process when engineering and technical designs are prepared to determine environmental and economic feasibility.

2. Possible adverse environmental effects on the visual resource, threatened and endangered plants and alpine tundra, must be properly mitigated.

3. The development alternative for the Snow Bowl permit area must provide quality downhill skiing. The environmental changes must be acceptable. Development will be phased to meet public demand. The economy of the Flagstaff community must not be adversely affected.

4. The preferred road development alternative must safely handle the expected traffic and be an all-weather surfaced, two-lane road built with minimum disturbance of the land. The road must be acceptable to Coconino County for inclusion in their road system, create the least amount of dust, and be easy to maintain.

Description of the Preferred Alternatives

1. The Forest Service prefers development of the Arizona Snow Bowl permit area to provide quality downhill skiing. In order to achieve this goal, the Snow Bowl permit area may be developed as follows:

a. A new day lodge may be constructed adjacent to the existing picnic area. The existing day lodge will continue to be maintained with improved restroom facilities. The total lodge capacity will be sized to accommodate one-third of the comfortable carrying capacity of the ski area.

b. The existing chairlift (Lift No. 1) may be reconstructed on the same alignment with the upper terminal located at approximately 11,500 feet elevation. This will lower the elevation of the upper terminal. The chairlift

capacity may be increased when reconstructed but should be in balance with skiable slopes.

c. Portable surface lifts may be used above the tree line, for skier access to the upper bowl, when conditions are suitable at the upper terminal of Lift No. 1.

d. New lifts numbered 3, 4, and 7, as shown on the maps, may be constructed. Lifts numbered 5 and 6, as proposed in the Master Concept Plan, will not be constructed. The existing Poma lift may be moved to the Agassiz ski trail for use by the ski school. New Chairlift No. 2 may be constructed on the existing Poma alignment and extended up to approximately 10,450 feet elevation.

e. A shuttle system from U.S. Highway 180 to the ski lodge will be provided to accommodate at least 50 percent of comfortable carrying capacity.

f. Parking lots will be maintained or constructed to accommodate approximately 670 skier cars, 19 buses, and up to 100 employee cars. This will require about 8.1 acres of parking.

g. Comforable carrying capacity will be 2,825 skiers at one time. This includes upgrading Chairlift No. 1.

h. No new runs will be constructed above approximately 10,950 feet elevation; but maintenance and minor improvements of existing runs above 10,950 feet will be allowed.

i. There may be 50 acres of new ski run clearing and 4 acres of new ski runs in natural openings to bring the skill area balance to:

Beginner – 27 percent or 55 acres
Intermediate – 36 percent or 75 acres
Advanced – 37 percent or 76 acres

j. No runs will be constructed outside of the existing permit area.

2. The Forest Service prefers improvement of the Snow Bowl Road to a 20-foot wide paved travelway with 4-foot paved shoulders. A road of this width will require the use of a shuttle system to handle at least 50 percent of the skiers at comfortable carrying capacity. No other traffic controls are necessary, but chains or four-wheel drive vehicles may be required depending upon road conditions. A shuttle system is included in the preferred alternative to reduce the need for parking in the Snow Bowl permit area and to limit road width. The road alignment follows Road B to minimize the disturbance of land. The road width of 28 feet was selected because that is the minimum width acceptable to the Coconino County Highway Department and necessary to handle the projected traffic safely. Paving was selected because it creates less dust, requires less surfacing material over time, and is cheaper to maintain.

The preferred alternatives as presented in a Final Environmental Statement and summarized here are the Forest Service decision. The preferred alternatives may be implemented 30 days after the date the Final Environmental Statement is filed with the Environmental Protection Agency. The 30 day waiting period is not a public response period. It is a time for the public to become aware of the decision before it is implemented.

Sincerely,

MICHAEL A. KERRICK
Forest Supervisor and Responsible Official
Coconino National Forest

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APPENDIX "E"

Regional Forester's Decision
Dated February 7, 1980

REGIONAL FORESTER'S DECISION
on
REQUEST FOR ADMINISTRATIVE REVIEW
of
FOREST SUPERVISOR'S DECISION TO EXPAND ARIZONA SNOW BOWL SKIING FACILITIES COCONINO NATIONAL FOREST

This appeal comes to me as provided by the regulations of the Secretary of Agriculture, 36 CFR 211.19, wherein anyone who disagrees with an administrative decision of a Forest Service officer may request administrative review. This appeal involved 101 appeals and 11 interventions that were timely filed.

On February 27, 1979, Coconino Forest Supervisor Michael A. Kerrick issued a Final Environmental Statement (FES) and Record of Decision which would permit the expansion of the Arizona Snow Bowl Ski Area within the existing permit area. This decision followed a long period of ski area master planning by the permitee, and environmental study and public involvement by the Forest Service.

The preferred expansion decision was chosen from seven alternatives which ranged from elimination of the ski area to total development of the ski area, as proposed by the permittee's master plan. In addition, a separate set of five alternatives were considered regarding improvement of the access road to the ski area. The road improvement decision was to reconstruct the road to a 20-foot paved travelway with 4-foot paved shoulders.

On March 16, 1979, the first request for administrative review and stay of implementation was received by the Forest Supervisor. By April 12, 1979, the last request for intervention

had been received. Within that period of time 112 requests for administrative review and for intervention were received.

On March 30, 1979, I granted a stay of implementation of the Forest Supervisor's decision which would remain in effect until I issued my decision. In the requests for administrative review and/or statement of reasons, 15 appellants and intervenors requested the opportunity to present their views to me orally. On April 19 and 25, 1979, I granted oral presentation to those who had properly requested it and established the procedures for the oral presentations. On May 4 and again on May 14, I received requests for administrative review of my procedural decision on the conduct of the oral presentations which were sent to the Chief of the Forest Service. A stay of implementation of the oral presentations was granted by the Chief of the Forest Service so the oral presentations were postponed pending resolution of the procedural appeal.

On June 4, 1979, my Responsive Statement to the procedural appeals was issued and then comments from the appellants were received. On August 23, 1979, the Chief issued a decision upholding the procedures I had established. On reviewing the record, I agreed to change the location of the oral presentations from Albuquerque, New Mexico, to Flagstaff, Arizona. The Secretary of Agriculture declined to review the Chief's decision and on September 7 the oral presentations were rescheduled for October 2-4, 1979, in Flagstaff.

A verbatim transcript of the oral presentations was taken, reviewed by the presenters, and the administrative review record was closed and was received from the Forest Supervisor on November 29, 1979.

This review was too complex to make a decision within 30 days of receiving the record so all parties to the appeal were informed that additional time would be needed to reach a decision.

The Review Record

The record of this appeal requires approximately 5 linear feet of file space and includes all the documentation leading to Supervisor Kerrick's decision, the material received regarding the appeals and interventions of the ski area expansion, the procedural appeals, and the oral presentations, and anything else received up to November 21, 1979, when the record was closed.

One hundred ninety seven cards and letters; eight separate statements of reasons; 83 supporting documents, briefs, appendices, exhibits, etc.; and about 16,000 signatures on petitions have been received expressing opinions about Supervisor Kerrick's decision. In considering the mass of opinion that has been submiteed, I have not "counted votes." Instead, all the submissions have been read and weighed, and opinion is strong in opposition to expansion. In addition, opinions have been subjectively judged as to the quality of their rationale, legal foundation, and the fairness to all parties involved.

The oral presentations in October 1979 provided 15 appellants and intervenors the opportunity to present their views orally. The opportunity to hear these views and opinions was very much appreciated and was quite valuable. The tremendous amount of opinion obtained person to person enabled me to better grasp the facts of this appeal, as well as to understand the depth of the feelings that are involved. It provided the catalyst that was needed to synthesize the reams of written material which have been received.

From the record, nine points of appeal have been identified which I believe require a response.

1. *The expansion of the Arizona Snow Bowl would violate statutory and constitutional rights of Native Americans to practice their Religion.*

Comment

Appellants and intervenors have made excellent arguments for both sides of this point. I have studied this question exhaustively from every angle and there is a more thorough review in the *Discussion* section of this decision. I conclude that the expansion could violate the rights of American Indians to practice their religions. However, removal of facilities or maintenance of the status quo to correct the above possible violation could also violate the rights of the ski area permittee and the right of the American public to a government that does not favor one religion over another. The dilemma presented by this situation and the conclusion drawn from it are discussed later in this decision.

2. *The expansion of the Arizona Snow Bowl would violate the Endangered Species Act of 1973.*

Comment

The FES provided that the two species of plants found on the area, that might potentially be on a final Federal Threatened and Endangered Plant list, would be given full consideration. The United States Fish and Wildlife Service (USF&WS) was satisfied with the consideration given and the proposed course of action. The Forest Supervisor proposed to develop a plan in conjunction with the USF&WS to protect any listed plant species found within the area.

There has been no violation of the Endangered Species Act, nor would any undertaking at the Arizona Snow Bowl likely result in a violation. At this time, it is not known if the two plant species under discussion are even threatened or endangered.

3. *Public involvement in the decision-making process was improperly displayed so as to favor expansion of the Arizona Snow Bowl.*

Comment

The Forest Supervisor's decision to allow expansion of the Snow Bowl was made in response to an application for expansion by the ski area permittee. The decision was made on the basis of the findings in the FES that the modified expansion proposed by the Forest Supervisor would not have an undue effect on the human environment. While public sentiment for or against such expansion is a factor in the decisionmaking process, the decision must necessarily consider all factors, which need not be enumerated here. The decision was not thrown out to be voted on. The Forest Supervisor is in the position of having to exercise the proprietary right of the Federal Government in the management and administration of its land. He must make many decisions that fail to please one or more of the "publics" that have an interest in a given matter.

In his response statement, the Supervisor points out some of the problems inherent in such "vote counting." How many American Indians can a religious leader claim to speak for? How many skiers does the representative of a skier's association represent? Are the geographic boundaries in which such publics are found limited to the area around the Peaks? Is it statewide or is it of national interest? These rhetorical questions merely point up the dilemma. In the long run, the best information is that which comes when someone cares to speak out or provide his views in writing. At that time, the Supervisor's reading of all responses was that the majority favored expansion, and I have seen nothing that would lead me to conclude that he misread the information he received. However, the Supervisor's decision, and the decision I have made were not based on "votes."

4. *The expansion of the Arizona Snow Bowl violates the National Environmental Policy Act of 1970.*

Comment

To a large extent this point is intertwined with most of the other charges made in the appeal. According to case law, an FES serves two purposes. First, it requires decisionmakers to examine and consider environmental factors before acting. Secondly, it acts as an environmental full disclosure statement permitting other officials, Congress, and the public to evaluate the environmental consequences on their own. See *State of California v. Bob Bergland et al.* (Eastern Circuit of California 1980, Civil No. S-79-523). I have thoroughly reviewed the FES, the information in the written record, and that supplied at the oral presentations. The Environmental Protection Agency (EPA) found that the FES was adequate.

I have concluded that the Forest Supervisor took a "hard look" at the environmental consequences of the action (see *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); and that he has complied with the National Environmental Policy Act of 1970.

5. *The trust and fudiciary duty owed to Native Americans was violated by the Forest Supervisor.*

Comment

The National Forests were established by the Organic Administration Act of June 4, 1897, to improve and protect the Forest within the boundaries, or to secure favorable conditions of water flows, and to furnish a continuous supply of timber. Later acts have expanded the purposes of the National Forests. The Forest Service as an agency is charged with administering and managing the National Forests in accordance with applicable laws. On the other hand, there are agencies that have been given direct and indirect responsibilities toward Native Americans in various ways. The trust and fiduciary duty owed to Native Americans by the Federal Government as a whole is well established. However, the implied duty of the Forest Service as a part of the Federal Government is not so clear and is particularly obscure in this case. The Forest Service

intent is to do its duty toward any segment of society that has an interest in the National Forests. I believe that no trust and fiduciary duty with regard to Native Americans has been violated. They were consulted and their views are given considerable weight.

With specific reference to the entire San Francisco Peaks, Forest Service actions have historically been such that any trust and fiduciary duty has been fully met. Without the Forest Service and its programs the Peaks, including the very summits of Mt. Humphries and Mt. Agassiz, could be in non-Federal ownership and Indians could very well be barred from entry by the owners of the land. Establishment of the National Forests and aggressive land acquisition programs have retrieved critical areas of the Peaks for public ownership. At one point, about two-thirds of these critical areas were in non-Federal ownership.

Other actions by the Forest Service have served to ensure the naturalness of the Peaks. A large area is protected as the San Francisco Peaks Research Natural Area. Still more is included in the C. Hart Merriam Scenic Area, and there is another area withdrawn as the Lockett Meadow Recreation Area.

Between these areas is an area mostly within the Inner Basin that is protected as the City of Flagstaff Watershed. Beginning in the early 1960's and up to the present there were written into multiple-use and land-use plans various requirements to preserve the scenic qualities of the Peaks. In addition, the potential of part of the Peaks for wilderness was recognized in the RARE I inventory which was carried over into RARE II. Over the years, grazing by livestock and logging activities have been restricted.

There is one conclusion to this. If not for Forest Service programs to acquire land and consolidate Federal ownership on the Peaks and its environs, and to ensure special designations and administrative prescriptions for the protection of natural conditions, the Indian religions would be immensely impacted and individuals of all beliefs could have been prohibited from

entering onto much of the mountain and the mountain itself might have a greatly changed aspect.

6. *The Forest Supervisor has failed to comply with the National Historic Preservation Act and Executive Order 11593, or alternately the expansion would violate that Act and Executive Order.*

Comment

The Forest Supervisor reviewed this point rather thoroughly in his Responsive Statement and his findings are correct. Those appellants who raised this point have misinterpreted the laws and regulations dealing with historic preservation and, in fact, have shown little knowledge of the procedures.

Aside from the obvious mixup in National registers, their lack of understanding of when a project becomes an "undertaking," and other misinterpretations of the 36 CFR 800 regulation, I believe there has been full compliance with procedures up to this point. The Forest Supervisor's decision to expand does not of itself violate either the National Historic Preservation Act or Executive Order 11593. They would be violated only if the Forest Service failed to follow the procedures outlined in 36 CFR 800. Essentially these procedures require:

a. An inventory of sites or properties.
b. A determination of eligibility for nomination to the National Register of Historic Places.
c. A determination of effect.
d. A plan to mitigate any adverse effect.
e. Consultation with the Arizona State Historic Preservation Officer and the Advisory Council at appropriate stages.

The initial actions of consulting the register and perusing lists of known sites were taken. There would be a detailed survey required prior to any development (i.e., the "undertaking").

I find that the Act and Executive Order have not been violated.

7. *The procedure of issuing a term special-use permit for permanent improvements and an annual special-use permit for ski slopes and trails exceeds the authority of the Forest Supervisor.*

Comment

This point is dismissed from the appeal. The issue under appeal in no way relates to the legality of the existing permits. Those permits were issued on April 15, 1977, and the period during which an appeal could have been taken against the issuance of the permits has long since lapsed.

In addition, I am without authority to provide any relief on this point because the procedure of issuing two permits is prescribed in the Forest Service Manual at 2726.61a by the Chief of the Forest Service as standard procedure for Service-wide use.

8. *The expansion of the Arizona Snow Bowl would violate the Multiple Use-Sustained Yield Act of 1960.*

Comment

I cannot agree that the Multiple Use-Sustained Yield Act would be violated by the expansion of the Snow Bowl.[1] The decision to allow expansion was made after giving due consideration to the relative values of the various resources of the area, as required by the Act. The Act provides for periodic adjustments in use to conform to changing needs and conditions. Multiple use has never meant that all uses will be there in equal

[1]Some authorities believe the Multiple Use-Sustained Yield Act is not conducive to violation. The Act recognizes that the mix of uses will not be in balance and will be ever changing. Courts have held that the Secretary of Agriculture has absolute discretion for making judgments on the proper mix of uses (see *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970) and *Sierra Club v. Harden*, 325 F. Supp. 99, 123 (D. Alaska 1971). The plaintiffs in many lawsuits have charged the Forest Service with violation of the Act but the courts, so far as can be determined, have preferred to sidestep the question by deciding issues on other grounds. A recent example is the January 3, 1980, decision in the Eastern District of California *(State of California v. Bob Bergland et al., supra)*.

amounts or that all of them will even be present on a particular area.

The Multiple Use-Sustained Yield Act actually specifies that the National Forests are to be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Section 2 of the Act refers to these as renewable surface resources. It appears inappropriate to try to administratively expand the meaning of an Act dealing with the renewable surface resources to include nonresource uses.

9. *The expansion of the Arizona Snow Bowl would violate the Wilderness Act of 1964.*

Comment

Some appellants assert that a Colorado case, *Parker v. United States*, *supra*, applies here. In that case, the court held that land potentially suitable for wilderness lying contiguous to an *existing* wilderness must be studied for possible inclusion in wilderness before the Forest Service took any action adverse to that wilderness character. That is not the case here.

The ski area is already developed. The expansion, which is at issue as a possible violation of the Wilderness Act, would take place within an existing developed ski area. It is usually recognized by wilderness proponents, planners, and managers alike that the wilderness values at such a developed area are already foregone.

In the case of the Arizona Snow Bowl, the major modification from wilderness conditions is the existence of artificially cleared ski trails and slopes, through a predominantly solid spruce-fir forest. Even if all physical improvements were removed, the ski area would be discernible for a very long time.

By any measure of eligibility, a developed ski area is simply not a candidate for wilderness designation.

In brief, a developed area lying contiguous to an area administratively indentified as suitable for wilderness designa-

tion does not fall within the principles enunciated in *Parker v. United States.*

Discussion

Various appellants have asserted that the Forest Service has violated or would violate several laws with the proposal to allow expansion of the Snow Bowl. These claims are discussed under the individual points of appeal and, as the comment on each indicates, I do not believe any law of the laws mentioned has been or would be violated. To a great extent many appellants have used a scatter-gun approach to this appeal by making numerous charges in their opposition to the Snow Bowl expansion. I must reject statements that such acts as the National Environmental Policy Act, the Multiple Use-Sustained Yield Act, the Endangered Species Act, the National Historic Preservation Act, and the Wilderness Act have been or would be violated.

The central issue has always been the effect of expansion on Indian religions. The American Indian Religious Freedom Act, 42 USCA 1996, has figured prominently in this appeal. This short Act was passed in 1978 as a Joint Resolution and, on its face, appears to be a rather simple policy statement by the Congress. The pertinent portions of the Act are as follows:

> . . . it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

and

> The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for admin-

> istering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

There are no court precedents involving this Act, although a case involving Tellico Dam is before the Sixth Circuit Court of Appeals. In addition, to the rather plain language of the Act, the legislative history seems to indicate that, contrary to the beliefs of several appellants, the purpose of the Act is fairly uncomplicated.

For instance, Representative Udall who was sponsor of the legislation said:

> Mr. Speaker, this bill just requires the President to direct the various Federal departments and agencies to evaluate their laws and regulations to see where they may adversely impact of (sic) the first amendment right of Indian people to practice their traditional religion. Where administrative changes can be made, consistent with the enabling legislation, to eliminate unwarranted restrictions on Indian religion, the bill intends the appropriate changes be made. Where the underlying law is determined to be the reason for such restrictions and these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes.

He also said of his bill:

> Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on the Indians . . . It is the intent of this bill to insure that the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.

Later in the debate he said:

> All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not . . . It simply says to our managers of public lands that they (Native Americans) ought to be encouraged to use these places. *It has no teeth in it.* It is the sense of the Congress. (Emphasis added.)

Mr. Udall also introduced into the record a letter from the Department of Justice stating "that it is the Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. That, of course, is the committee's understanding and intent."

Mr. Roncalio, a member of the Committee, stated: "I hope we can keep an open mind long enough to realize that it *is not conveying any right to anybody.*" (Emphasis added.)

It soon becomes obvious in reading the legislative history that the proponents of the Act did not consider the Act completely overriding when there is conflict with another activity. Mr. Udall himself had a way of downplaying the bill. At one point he said:

> *It simply says* to our managers of public lands that they ought to be encouraged to use these places. *It has no teeth in it.* It is the sense of the Congress. (Emphasis added.)

And later in reply to a question as to why no hearings were held on the bill:

> It just seemed *so simple and so self-evident that it was merely a statement of policy* . . . (Emphasis added.)

Representative Risenhoover (Oklahoma) further clarified the purpose of the bill thusly:

> All this bill does is assure the Indian people the right to practice their religion on public property, on Federal property.

And later:

> This is simply a resolution for the preservation of the freedoms of the American Indian to practice their various religions.

Based on a reading of the Act itself, its legislative history, and the absence of court interpretation, I conclude that it means literally what it says and that it did not confer any additional rights to Indians beyond those rights guaranteed by the First Amendment. No laws pertaining to the National Forests were repealed or modified.

I am, however, greatly concerned over the constitutional questions involved. Appellants assert the expansion of the Snow Bowl would violate Indian First Amendment rights to practice their native religions. There seems to be no doubt that the Indian beliefs regarding the Peaks are sincere and are an important part of their religions. Therefore, it may be reason-

able to assume that the First Amendment protection due the Indians extends to the mountain itself, and that expansion could violate those First Amendment rights.

Thus, viewed at least from the standpoint of the right to the free exercise of religion, any of the alternatives in the FES that allow expansion of the ski area could infringe on First Amendment rights. However, the First Amendment is a two-edged sword. It also has the so-called establishment clause which provides that "Congress shall make no law respecting an establishment of religion . . . "

Some proponents of expansion point out that the American Indian Religious Freedom Act, when taken in conjunction with the First Amendment free exercise clause, could be construed as a violation of the First Amendment establishment clause. There have been cases where the court pointed out that claims that the right to free exercise of a religion were impinged ran a collision course with the prohibitions of the establishment clause (see *O'Malley v. Brierly*, 477 F. 2d 785 (3rd Cir. 1973)).

It is possible, therefore, that if the ski area expansion is not allowed in order to accommodate the religious beliefs of Indians, that the Forest Service would be charting a collision course with the prohibitions of the establishment clause. It could be argued that the Forest Service had adopted a policy which favored, aided, sponsored, and protected one religion over nonreligious or secular activity, or other religions.

So far, we have considered only the First Amendment. Other Constitutional issues might also be raised in this case. For instance, some appellants demand complete removal of man-made improvements on the entire Peaks area. This demand could lead to the violation of Fifth Amendment rights regarding the right to full enjoyment of property by the Snow Bowl permittee and other owners of improvements located on National Forest land.

The removal demand could also be a two-edged sword because private property can only be taken for a *public purpose*.

Thus, it would be risky to argue that improvements should be taken by the Government to satisfy the requirements of a religion or that tax money should be used to compensate the owners in furtherance of a religion. It is doubtful that anyone wants to assert that a religion constitutes a "public purpose."

In addition to Fifth Amendment rights to property, every citizen enjoys common law rights to the full use and quiet enjoyment of his property, whether it is personal property or real estate.

The Constitution also contains a property clause that places the control of the public lands with the Congress. Congress has unlimited authority over the public lands and has expressed its sense for the management of the National Forests in a series of laws such as the Organic Administration Act of 1897, the Multiple Use-Sustained Yield Act, and the National Forest Management Act. Thus, I am also vitally concerned with the proprietary rights of the Government in its property; or the right to manage that property.

Because of all these conflicting legal issues, I am presented with a dilemma. Between the possible violation of First Amendment rights to exercise one's religion without restriction, the stricture against the establishment of religions by Governmental action, the impingement of private property rights, and the proprietary rights of the Government in its own land, there seems to be unresolvable conflict. Certainly in this case, the conflicts are apparent.

These competing legal claims may each have a sound basis. Legal advice on the matter is not conclusive as to which points of view have the better merits. Indian religious claims dealing with a whole mountain are new and untested. The Indian Religious Freedom Act is also new and untested. Against this background, it has proven impossible to decide this appeal on legal grounds.

Perhaps the best that one can hope for is to achieve a balancing act between competing Constitutional issues. Thus, it is

possible that the expansion approved by the Forest Supervisor may go too far and would result in a tilt toward development and infringement on the free exercise of religion. Removal of improvements would certainly tilt the other way. Strict status quo would not be in the interest of public safety and would, in the long run, amount to removal as obsolescence sets in.

There is another consideration that has weighed very heavily in my deliberations. The Snow Bowl, while it has been there for many years and is one of very few ski areas in Arizona, is not an outstanding winter sports area when measured against national standards, nor can it ever be made into one. At the same time, there is an increasing demand in Arizona for downhill skiing. It is obvious, however, that no amount of development would make the Snow Bowl into a topnotch area; nor will the expansion approved by the Forest Supervisor or even the permittee's larger proposal provide for all the demand. Where then is a good place to cut off development? I have concluded that a good cut-off place is somewhere near the present size.

Thus, the following decision is based on nonreligious considerations.

Decision

The Forest Supervisor's decision to authorize expansion of the Snow Bowl winter sports area is hereby modified to provide only for repair and replacement of existing facilities as required by obsolescence, public safety and deterioration. This decision does not mean that everything must only be replaced "in kind;" only that additional improvements may not be added except for compelling safety reasons. For example, an existing obsolete lift which is no longer manufactured may be replaced with a modern lift which, in all likelihood, would have a greater uphill capacity because of higher speed and other design improvements. However, a double chair will not be replaced by a triple chair or a gondola, nor will additional lifts or surface tows be added. Improvements or modifications may also be

authorized to take care of environmental concerns. A key criterion for any repair or replacement action will be to minimize change or disturbance. Thus, the contemplated improvement of the access road should be modified to stay within the existing road prism, unless there are specific compelling safety reasons for doing otherwise. However, with appropriate engineering considerations, an all-weather surface may be laid upon the alignment of the existing unstablized road surface.

Clearing or modification of existing ski trails must be restricted. To the greatest extent possible, safety on the trails must be accomplished by marking and signing obstructions and hazards, and by direct administration of the skiing public. The permittee may be allowed to modify his method of operation to achieve better utilization of the existing development, such as by longer hours of operation.

Mitigation

The course of action directed by this decision is not precisely displayed as one of the Alternatives in the FES. This action lies somewhere between Alternatives 2 and 3 and Road A and B. However, I conclude that:

1. A new FES is not required for the replacement, through obsolescence or other reasons, of improvements on an area already allocated to this use. Some work could require an individual assessment of impacts and needed mitigation. For instance, the effects of reopening construction trails.
2. The overall effects of a range of actions are adequately considered in the Forest Supervisor's FES.

One of the primary concerns that the Forest Supervisor addressed with the proposed expansion of the Arizona Snow Bowl was the existing undesirable and unsafe mixture of skiing skill levels. The ski area has both an out-of-balance proportion of beginner/intermediate/advanced acreage, and a poor mixture of skill levels on some ski trails. Without the proposed expan-

sion, this deficiency will remain uncorrected. The area is particularly short of beginner slopes.

Several things can be done to relieve this situation:

1. Inform the skiing public as to the general nature of the opportunities at the Arizona Snow Bowl.
2. Ensure that skiers are aware of the minimum skill level required to descend trails served by lifts at each lower lift or tow terminal. Build in appropriate skill level frictions on the approach to the loading platform.
3. Ensure that skill level signing at all ski trail beginnings, junctions and enroute is adequate.
4. Facilitate studies, EAR's/EIS's, and prospectuses for other possible sites for new ski areas on the Coconino, Kaibab, and Apache-Sitgreaves National Forests, particularly those which offer complementary skill levels to the Arizona Snow Bowl.
5. Facilitate management of nordic skiing and snowplay by the public and private sectors at appropriate sites in Northern Arizona.

Include, in interpretive programs for the Coconino National Forest, an effort to sensitize skiers and other visitors to the San Francisco Peaks to the sacred nature of the mountain and its influence in the religions and cultures of the concerned Indian tribes and pueblos. This should be done in consultation and in cooperation with the Indian religious leaders and the tribal/pueblo governments.

Appeal Rights

Any party to this appeal that disagrees with this decision may file a request for administrative review by the Chief of the Forest Service. Such request must be filed with me within 30 days of receipt of this decision and must follow the procedures prescribed in 36 CFR 211.19.

M. J. HASSELL / Regional Forester

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APPENDIX "F"

Chief's Decision
Dated December 31, 1980

CHIEF'S DECISION
on
REQUEST FOR ADMINISTRATIVE REVIEW
of
SOUTHWESTERN REGIONAL FORESTER'S DECISION
involving
ARIZONA SNOW BOWL SKIING FACILITIES
AND THE SNOW BOWL ROAD
COCONINO NATIONAL FOREST

The parties involved in this administrative review have copies of the Regional Forester's April 21, 1980, Responsive Statement. The Statement describes the basis for the appeal, the history and background, the decision under appeal, the points of appeal, and the requests for relief sought by various appellants. Accordingly, those factors are not repeated here.

In my review of this case, I have found two pervasive issues which underlie the grievances of almost all parties to the appeal:

I. Religious rights of Native Americans.

II. Suitability of the Arizona Snow Bowl for additional facilities and use.

Although closely related to several of those issues identified and discussed by the Regional Forester, these two are analyzed and dealt with separately due to their overriding importance.

I. *Religious rights of Native Americans.*

The record contains extensive and diverse evidence and arguments on this issue. There is essential acceptance by all parties that the San Francisco Peaks area is considered sacred by Navajo and Hopi people and used by them for purposes of worship.

Appellants speaking on behalf of Native American religious leaders and practitioners contend that development activities on the San Francisco Peaks area which involve soil or vegetation disturbance or commercial activity interferes with the practice of Indian religions. These appellants contend the Forest Service is prevented from permitting such activities on these mountains by reason of the First Constitutional Amendment and the American Indian Religious Freedom Act. They contend the Forest Service must disallow the building of additional facilities within the area currently occupied by the Arizona Snow Bowl. In addition, many feel existing facilities must be removed and skiing use discontinued.

Appellants speaking on behalf of additional skiing facilities argue that no Indian religious rights are infringed by development and use of the area for winter-sports purposes. They contend recreationists have as much right to use the San Francisco Peaks area for secular purposes such as skiing as Native Americans do for religious purposes. They claim denial of construction of additional facilities by the Regional Forester was a religious-based decision and was Constitutionally improper since it has the alleged effect of fostering religion.

The First Constitutional Amendment provides protection to all Americans of the freedom to practice their religion and to believe as they choose. The American Indian Religious Freedom Act reinforces and reiterates that right for Native Americans.

Although closely related, for purposes of analysis and discussion, we have separated the two religious questions; namely, the freedom to *believe* and the freedom to *practice*.

The freedom to believe

The religious beliefs of Navajo and Hopi people are extensively described and discussed in testimony and affidavits from religious leaders and practitioners. They believe the San Francisco Peaks area is the home of their Gods; that the presence of

skiing facilities and the excavation or construction activity is a desecration of that home, and at some point will drive those Gods away, at which time the Gods will punish the believers for failure to protect the home. They believe should the Gods be so offended, these Gods will no longer bless and protect the believers.

The evidence in the record reflects those beliefs are sincerely held by those who express them.

All members of society may believe as they choose, but the First Amendment provides no assurance that other members of society must behave in conformance with those beliefs. The myriad secular as well as religious beliefs which exist in our society are constantly disturbed by some aspect of institutional functioning of the Nation. An activity which may be compatible with the beliefs of one person is frequently viewed as disruptive to the beliefs of another. Neither the First Constitutional Amendment nor the American Indian Religious Freedom Act assures believers of Native American religions that other members of society must act and behave in conformance with their beliefs.

The freedom to practice

On this point, religious practitioners, under certain conditions, may have Constitutional protections from acts by other members of society which would infringe upon their rights to worship as they may choose.

The record contains extensive evidence the San Francisco Peaks area is used as a place of worship by Hopi and Navajo people. Practitioners conduct a variety of rites and religious activities at indeterminate locations in the Peaks area, including the collection of natural material and objects considered to be sacred or necessary in religious ceremonies. Religious practices also include placement of offerings and worship at shrines, reciting of prayers and singing of religious songs, and the conduct of healing ceremonies.

In regard to the use of the 777 acre Arizona Snow Bowl tract, the record shows the ski area and the access road are used as a means of access by Indian religious practitioners traveling to sacred locations at higher elevations. Evidence is lacking as to the nature or extent the area under permit is used for worship purposes.

Along with all other members of society, Native Americans enjoy the freedom to practice their religion as they choose. To the same extent and subject to the same reasonable conditions applicable to all other members of the public, Hopi and Navajo people have in the past and may in the future continue to use National Forest land in the San Francisco Peaks and Arizona Snow Bowl area for religious as well as secular purpose.

The record contains no evidence existing or proposed facilities and activities have in the past or are likely in the future to significantly interfere with religious practices of Native Americans.

Summary of findings

1. Although Native Americans may consider development and use of the Arizona Snow Bowl to be adverse to their religious beliefs, neither the First Constitutional Amendment nor the American Indian Religious Freedom Act provide protection from such development.

2. Evidence does not show that existing or proposed development and use of the Arizona Snow Bowl significantly interferes with religious practices of appellants.

In summary, we find no legally protected religious rights have been abridged as a result of past development and use of the Arizona Snow Bowl and no such rights are likely to be abridged should additional facilities and service be provided at the Arizona Snow Bowl.

II. *Suitability of the Arizona Snow Bowl for additional facilities and use.*

Appellants, on behalf of further development contend the permitted area is suitable for additional winter-sports development and use as proposed. They rely on slope, terrain, aspect, soil, and vegetation conditions and on temperature and precipitation records included in the Environmental Statement. They point out the subject slopes were successfully used for skiing purposes in the past and that portions of the slopes to be served by proposed chair lift no. 3 are currently used in connection with the four existing surface lifts.

Appellants in opposition to development contend certain terrain is likely to receive insufficient and unreliable snow cover to support skiing. The Regional Forester's February 7 decision is based in part on apprehensions of the suitability of the site to support an "outstanding" or "top notch" ski area when measured against national standards.

The record shows that snow accumulation was adequate to support skiing for 13 out of the 18 years reliable snow depth data was available. For those five "bad" years, a diminished level of skiing use occurred.

The Arizona Snow Bowl has been operated commercially for almost 40 years, and for non-commercial purposes for a short period prior to that time.

During the period from 1938 until the lodge burned in 1952, the slopes to be served by proposed lift no. 3 were used for skiing purposes. Several appellants who used the area during that time period contend that snow conditions were suitable for skiing purposes during the winter-sports season. Those contending snow conditions may be inadequate offered no data to support such a conclusion.

The Final Environmental Statement contains snowfall and snow accumulation data, part of which is based on correlation with Fort Valley weather station data, a site located several

miles from the ski area and at a lower elevation. One appellant questions the manner in which the correlation was done. However, the snow dependability dispute seems to center around the permanence of the snow pack within the area north and east of the proposed lodge rather than on the total amount of snowfall. Due to the west facing aspect, the snow accumulation here is subjected to higher daily afternoon maximum temperatures with expected attendant snow melt and greater dissipation of snow pack than that which occurs on the currently developed slopes.

During years with average or greater than average snowfall, the slopes to be served by the proposed new lifts numbers 3 and 7 would likely be suitable for use during most all of the skiing season. However, during years with less than average snowfall, these particular slopes could be unsuitable for skiing use for a portion of the season even though the remainder of the area may continue to be suitable for such use. Under such adverse circumstances, the area would be able to accommodate fewer skiers and provide fewer visitor days of service. Gross revenue and operating margins would likely suffer during such circumstances. This is part of the risk weather-dependent businesses must bear. Most ski area operators accept this type of financial risk to varying degrees.

As evidenced by their application and proposal to provide additional facilities, the permittee apparently feels the risk is worth taking. As the landowner, the Government provides no guarantee the operation will be financially successful. Although there may be some risk of interruption to the availability of public service at the site, new development and use will create little financial risk to the Government.

The determination of suitability is discretionary. Although there may be some areas within the ski area more suitable for skiing use than others, in my judgment, the weight of the evidence supports the conclusion that the area on which development and use is proposed is sufficiently suitable to accommo-

date winter sports activities. It is clear that by developing additional facilities, capacity for use will be increased. Greater skier visitation will be possible than without the new development.

As was brought out in the Final Environmental Statement and by a number of appellants, the Arizona Snow Bowl is one of four developed ski areas in the State. Due to insufficient snow accumulation except at the higher elevations, there are limited sites in Arizona which might be developed to serve the growing alpine skier population. Along with a number of appellants, the Regional Forester points out the site is one of the best, if not the best skiing opportunity in the State. The Snow Bowl takes on added importance because of the lack of skiing opportunities available to Arizona skiers. If the development proposal were denied, skiers would have to travel to more remote locations such as New Mexico, Colorado, Utah and California with attendant increases in travel related energy consumption.

Finding

In summary, I find the undeveloped terrain on which additional facilities are proposed to be sufficiently suitable for skiing use to warrant approval. Increased public benefits in the form of greater skier visitation can be expected. Central Arizona skier demand can be satisfied in a more energy efficient manner at the Arizona Snow Bowl than at alternate locations. Approval of the proposed new facilities is consistent with Forest Service policy.

Other Points of Appeal

With few exceptions, I find the Regional Forester and Forest Supervisor fully and properly responded to issues identified by appellants. However, my finding as presented above have some bearing on certain of these issues. For continuity

and understanding, I will address each of the 16 points of appeal identified by appellants of the Regional Forester's February 7, 1980, decision.

A. *Arizona Snow Bowl was not properly evaluated as to its importance to Arizona Skiers.*

My findings as discussed above have the effect of mooting this issue, however, an explanation of Forest Service policies and goals is in order. The pertinent policy is summarized and paraphrased as follows:

> To the extent there is a public demand and suitable National Forest land available to satisfy the demand, the use of such land for winter-sports or similar outdoor recreation activities will be permitted subject to conditions necessary to mitigate possible conflicts and to protect the environment and the health and safety of the public.

It is evident there is local and regional demand in Flagstaff and Arizona for downhill skiing services and that the Arizona Snow Bowl through provision of additional facilities and services can satisfy some of the demand within acceptable environmental constraints. To the extent the addition of facilities at the Arizona Snow Bowl can satisfy demands of Arizona skiers, then it is consistent with Forest Service policy to allow such additions.

B. *The Regional Forester's decision will increase accidents at Arizona Snow Bowl.*

My findings above have the effect of mooting this issue. However, I agree with the Regional Forester's responsive statement on this point.

C. *The Regional Forester's decision will result in the failure of Arizona Snow Bowl and elimination of all alpine skiing on Francisco Peaks.*

My findings above have the effect of mooting this issue.

D. *The economy of Flagstaff will be adversely affected by the Regional Forester's decision.*

My findings above have the effect of mooting this issue.

E. *Native American religious considerations exerted too much influence on the Regional Forester's decision.*

It is evident from review of the record that religious-based issues were of paramount concern to both the Regional Forester and the Forest Supervisor in their respective decisions. The documentation on this point is extensive. A multitude of information, arguments, and points of view were presented by appellants, intervenors, and parties to the appeal. The analyses of this material by the Forest Supervisor in reaching his decision and by the Regional Forester in reviewing that decision clearly reflect their sincere concern that the rights of Native American religious practitioners be fully protected. The importance of this issue to the Navajo and Hopi people is apparent. It was necessary for the Regional Forester to examine the religious considerations and present the rationale in detail in support of his conclusion.

F. *Statutory and Constitutional protection of Native American religions has been violated by not requiring total removal of all ski facilities.*

I agree with the rationale contained in the Regional Forester's Responsive Statement.

G. *Trust and Fiduciary duty owed to Native Americans has not been properly redeemed by the decision.*

The Regional Forester has properly responded to this point. Forest Service fiduciary responsibilities to Native Americans are identical to those afforded to all other members of society.

H. *The Endangered Species Act of 1973 has been violated by the Regional Forester's decision.*

This point was answered fully in the Regional Forester's decision and Responsive Statement. There is no violation of the Act.

I. *The National Environmental Policy Act (NEPA) has been violated by the Regional Forester's decision.*

The Final Environmental Statement and all of the preceding steps examines and considers the social, economic, and environmental factors attendant with the various alternative decisions. Both the Supervisor in his decision and the Regional Forester in his review of the decision acted in full concert with NEPA.

J. *Regional Forester's decision violated the Code of Federal Regulations (36 CFR 211.19m) in that he based his decision on factors other than those contained within the Administrative Review Record.*

The administrative review process as prescribed by the regulation provides latitude to the reviewing officer in utilizing such documents and other information as may be required to reach a decision. The Regional Forester as reviewing officer acted within the scope of the regulations even though he reached a different conclusion than the Forest Supervisor.

K. *The decision of the Regional Forester constitutes an abuse of discretion in that his powers were used for an improper purpose.*

This point is without foundation. There is no evidence of abuse of discretion.

L. *The decision is an abuse of discretion because it departs from the established practice in similar cases.*

I agree with the conclusions presented in the Regional Forester's Responsive Statement.

M. *The decision of the Regional Forester is in violation of the Federal Administrative Procedures Act and should be set aside.*

The Administrative Procedure Act is not operative here. The discretionary nature of the decision exempts it from the provisions of the Act.

N. *The "balancing act" of the Regional Forester's decision is not allowable in that it is based on a misconception of law by the agency.*

My findings above have the effect of mooting this issue.

O. *The decision of the Regional Forester constitutes a determination of equity between two opposing interests that should not be allowed to stand in equity since one of the interests is guilty of laches.*

I concur with the Regional Forester's comments as included in the Responsive Statement. There apparently is misunderstanding on the part of this appellant in regard to the land

management planning process used by the Forest Service. The Land Use Plan for the San Francisco Peaks did not address the nature and extent that the Snow Bowl area might be developed, so there was only limited basis on which concerned persons might protest the subsequent proposal for new facilities.

P. *The mitigation of the decision is inadequate and gives evidence of the Regional Forester's lack of diligence in examining the effect and scope of his decision.*

I agree with the Regional Forester's comments on this point.

Summary of Findings

1. No legally protected religious rights have been abridged as a result of past development and use, and no such rights are likely to be abridged should additional facilities and use be authorized at the Arizona Snow Bowl.

2. The suitability analysis as included under point "A" of the Responsive Statement fails to present fully persuasive evidence or data supportive of the decision.

3. The undeveloped terrain on which additional facilities are proposed is sufficiently suitable for skiing use to warrant approval.

Decision

Accordingly, I am reversing the February 7, 1980, decision and restoring in full the February 27, 1979, decision of the Forest Supervisor which conditionally authorizes construction of additional facilities and reconstruction and improvement of the Snow Bowl Road.

As provided by the Final Environmental Statement, traditional Indian religious practices will continue to be permitted. As has occurred in the past, the San Francisco Peaks including the Arizona Snow Bowl can continue to provide religious as well as secular benefits to the using public.

A copy of this decision has been made available to the Secretary of Agriculture in accordance with 36 CFR 211.19 (j) (2). On his own initiative, the Secretary may decide to review the decision within 10 days of receipt. The Secretary will not consider any request for such review. In the event the Secretary does not review the decision within 10 days of receipt, this decision will constitute the final administrative decision of the Department of Agriculture.

R. MAX PETERSON
Chief

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APPENDIX "G"

Letter-Opinion of the Forest Supervisor:
NHPA Remand Proceedings
Dated August 17, 1981

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
Coconino National Forest
2323 East Greenlaw Lane
Flagstaff, Arizona 86001

Mrs. Ann A. Pritzlaff
State Historic Preservation Officer
Arizona State Parks
1688 West Adams
Phoenix, Arizona 85007

Dear Mrs. Pritzlaff:

On June 26 and August 3, 1981, meetings were held at your office to discuss the procedures the Forest Service should follow regarding the proposed improvement of the Arizona Snow Bowl and to initiate the consultation process required by Title 36, Part 800 of the Code of Federal Regulations. At the June 26th meeting, in addition to yourself, were Michael Ramnes, Director of Arizona States Parks; Roland Sharer, Deputy Director of Arizona State Parks; Frank Fryman, Archaeologist and Compliance Coordinator of your office; William Holmes, Coconino National Forest Deputy Supervisor; Don Freeman, Coconino National Forest Recreation and Lands Staff Officer; and Peter J. Pilles, Jr., Coconino National Forest Archaeologist. On August 3, the same people were in attendance, with the exception of Mr. Ramnes.

On August 5, 1981, you and Mr. Fryman conducted a field inspection of the Snow Bowl Permit area, the hiking trail to Mt. Agassiz, the Snow Bowl Road, Fern Mountain Ranch, the

C. Hart Merriam Base Camp, the old Snow Bowl Lodge, and AR-03-04-03-295. On August 5th you were accompanied by Neil Paulson, Coconino National Forest Supervisor; William Holmes; Max Reid, Flagstaff District Ranger; Don Freeman; and Peter Pilles. Following the field inspection, you, Fryman, Paulson, Holmes, Freeman, and Pilles met once more to continue the consultation process.

The following matters were discussed:

A. The area of the undertaking's potential environmental impact as specified in Title 36 CFR Part 800.2(o).

B. The presence or absence of properties listed in or proposed for listing in the National and Arizona Registers of Historic Places.

C. The effect of the proposed undertaking on the C. Hart Merriam Base Camp and Fern Mountain Ranch, properties now listed on the National Register.

D. The potential National Register eligibility of the San Francisco Peaks as a cultural and historical entity in and of themselves.

The purpose of this letter is to formally document the consultation process pursuant to Title 36, CFR Part 800 including the extent of cultural resource surveys which have been performed in this area, and to request your concurrence with Forest Service determination on the above points.

Since our last meeting, we have been in contact with our people at the Regional and Washington Offices. Since the Chief of the Forest Service has been involved in the appeals and litigation related to this case, it will be appropriate that the various determinations and actions which must be taken by the Forest Service be decided by him. Accordingly, we intend to forward our record of information, findings and conclusions including this record of consultation for his review and decision.

The proposed improvement of the Arizona Snow Bowl will involve the following developments:

(1) A new day lodge to be constructed adjacent to the existing picnic area.
(2) Reconstruction of the existing chair lift (Lift No. 1).
(3) Construction of new chair lifts (Lift No. 2, 3, 4, and 7).
(4) Moving existing Poma lift to a new location.
(5) Construction of parking lots for cars and buses (8.1 acres).
(6) Clearing 50 acres for new ski runs.
(7) Reconstruction of existing access road to a 28 foot paved surface.

The purpose of the construction is to provide better quality and safety for downhill skiers.

A. *Area of the Undertaking's Potential Environmental Impact*

In accordance with 36 CFR 800.2(o), the Forest Service has sought your advice in determining the area of the proposed development's potential environmental impact. At our June 26 meeting, it was agreed the area of potential environmental impact of the proposed undertaking consists of the Arizona Snow Bowl permit area (Attachment 1), the 28-foot wide pavement and reconstruction width of the Snow Bowl Road as described in the Final Environmental Statement (Attachment 2), and a 30-foot buffer zone on either side of the Snow Bowl Road.

This area of potential environmental impact encompasses that geographical area where direct and indirect effects may result due to the proposed development. An effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling or association of a property that has been determined to be eligible for listing in the National Register of Historic Places. As set forth in 36 CFR 800.3(a), direct effects occur at the same time and place as the

undertaking. The area of the undertaking's potential environmental effects also encompasses indirect effects caused later in time or farther removed in distance from the undertaking, but which are reasonably foreseeable.

As Attachment 1 indicates, the 777 acres within the permit area boundaries are the extent of the geographical area within which effects from the proposed improvement to the Arizona Snow Bowl can reasonably be expected to occur. Within the permit area, only a small portion of acreage is proposed for development (approximately 77 acres). The acreage surrounding the proposed development, in addition to the actual nature of the terrain and vegetation, will form a buffer zone for the activity that occurs at the facility.

Similarly, the 30-foot wide buffer zone on either side of the Snow Bowl Road is the extent of the geographical area within which effects from the proposed improvements to the Arizona Snow Bowl Road can reasonably be expected to occur. A total of 60 feet on either side of the road was surveyed (Stein and Pilles 1981b) and no archaeological sites were found within this area. The majority of traffic using this road is destined for the Snow Bowl itself. Given the terrain and vegetation, this is the only reasonably foreseeable use for the road area.

Accurate predictions of the increase in use of the Arizona Snow Bowl due to the proposed development are difficult to make. Figures suggest, however, that the predominant increase in use will occur during the winter season and will be affected directly by snow conditions. For the past 3 years, summer use of the lift has remained constant at about 24,000 people. Winter-time use fluctuated with existing snow conditions:

Winter Season	Ski Lift Users
1974-1975	27,500
1975-1976	36,000
1976-1977	13,300
1977-1978	65,128
1978-1979	90,000
1979-1980	77,883
1980-1981	23,559

One can reasonably expect any effects from the proposed undertaking would be related to the increase in winter time use of the Snow Bowl area and the attendant effects of that increase in use. The development would be contained well within the permit area and no significant modification in patterns of land use will occur.

B. *Properties Identified on or Eligible for the National and State Registers of Historic Places.*

Pursuant to 36 CFR 800.4 (a) (1) we have consulted with you and others regarding the presence of sites listed or eligible for listing on the National and State Registers (Attachments 6 and 7). It has been determined two National Register properties are listed in the vicinity of the proposed development, although well outside the defined area of potential environmental impact. These are the C. Hart Merriam Base Camp and the Fern Mountain Ranch (Attachment 2). Survey of the permit area and the road right-of-way (Clemets 1981, Kelley 1980, Stein and Pilles 1981a, 1981b) revealed one site, the old Snow Bowl Lodge (AR-03-04-03-199). A potential site, AR-03-04-03-295, was found 70 feet beyond the roadway and outside the area of direct and indirect impact.

The old Snow Bowl Lodge was a stone and log building constructed in 19401941 (*Coconino Sun* 1940, 1941) that burned in 1952 (Coconino National Forest 1979:29; Kelley

1980:56, Stein and Pilles 1981a:1-2, 1981b:2). The ruins were subsequently razed and removed. Today, nothing remains at the site except a concrete and stone foundation and a scattering of burned glass, crockery, and metal fragments. The site is less than 50 years of age, lacks integrity, and has little potential for contributing information important to history. It, therefore, fails to meet the criteria of eligibility for the National Register.

The other site located, AR-03-04-03-295, was not evaluated since it lies outside the area of the undertaking's potential direct and indirect impact.

C. *Determination of Effect on C. Hart Merriam Base Camp and Fern Mountain Ranch.*

As mentioned above, these two listed sites are in the general vicinity of the Snow Bowl although they are well outside the area of the undertaking's potential environmental impact. Nevertheless, we have afforded them special consideration, as detailed below.

Title 36, CFR Part 800.3 provides that effects are evaluated against "the quality of the historical, architectural, archaeological, or cultural characteristics" that qualify a property for the National Register and that "an effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association that contributes to its significance in accordance with the National Register criteria." The two listed properties have been evaluated in this context, as provided for by 36 CFR 800.4(d).

C. Hart Merriam Base Camp. This is the site where an early American ecologist of note may have camped. Further description may be found in the National Register nomination form.

This site meets the following National Register criteria, as set forth in 36 CFR 1202.6: (a) it is associated with events that have made a significant contribution to the broad patterns of our history; and (b) it is associated with the lives of persons significant in our past.

The site is about 3.3 miles distant from the Snow Bowl Lodge; access is via the Hart Prairie Road, not the Snow Bowl Road (Attachment 2); and neither the Snow Bowl area nor the Snow Bowl Road can be seen from the site. Access, distance, and the topography between the Snow Bowl and the C. Hart Merriam Base Camp are such that hikers and skiers cannot reasonably be expected to travel from the Snow Bowl site. Thus, risks of fire and vandalism cannot reasonably be expected to increase as a result of the proposed development.

The National Register characteristics of the C. Hart Merriam Base Camp are based upon the site's commemorative value to an event and association with an important person and not to any cultural or natural features of the location. Changes in the spring at the site to provide water for stock and wildlife have altered the setting of the original camp. The proposed undertaking will have no reasonably foreseeable effect upon the commemorative values that qualified this property for listing on the National Register of Historic Places.

Fern Mountain Ranch. The National Register nomination form for this site indicates its significant quality is its commemorative value as a pioneer ranch associated with the development of tourism, transportation, and the first breeding of Arabian horses in Arizona. It is also mentioned that Theodore Roosevelt once stopped at the ranch. The ranch is eligible under Criteria (a) and (c) and, to a lesser degree, Criterion (b), as set forth in 36 CFR 1202.6.

The Ranch is about 1.8 miles from the Snow Bowl Lodge. Access to the Ranch is not provided by the Snow Bowl Road (Attachment 2) but rather by a private road off the Hart Prairie Road. The Ranch access road is barred by a gate; the property is fenced and clearly posted with no trespassing signs; and there is a resident caretaker at the site for part of the year. The buildings at the Ranch are mostly hidden by trees and are not visible from the Snow Bowl Picnic Area or the Lodge. With scrutiny along the tree line, the ranch buildings can be detected

from the top of the ski lift and, for brief periods of time, from the ski runs and the ski lift.

Although the EIS indicates use of the permit area will increase; the distance to, location of, and signing and fencing of the Fern Mountain Ranch all serve to reduce any potential visitation of the Ranch from the Snow Bowl area. It has also been shown that topography and season of use tends to limit the areas that will be impacted by this use.

Mr. Richard Wilson, owner of Fern Mountain Ranch, and some others we have consulted (Attachment 7), fear that increased vandalism will occur to structures at the site because of increased use of the Snow Bowl area.

Mr. Wilson stated in a letter to us that vandalism has increased over the last few years to the point that he now has a watchman at the site and that one of the buildings at the Ranch was burned by vandals last year. This is the only documented occurrence of vandalism to a historical site since 1977.

Those who use the Hart Prairie area where Fern Mountain Ranch is located, enter from all directions, but particularly from the Hart Prairie Road. Very few people will wish to hike cross-country the 1.8 miles from the Snow Bowl to Fern Mountain Ranch and then back uphill over steep slopes to return to their vehicles. Nor in the winter time, will many downhill skiers come down to Fern Mountain Ranch from the Snow Bowl.

On August 5, 1981, we discussed the problem of vandalism and the number of people who come to the Ranch from the Snow Bowl with the Fern Mountain Ranch caretaker. He indicated most cross-country skiers enter by way of the Hart Prairie Road, which is not plowed in the winter. He estimated that 11 skiers came to the Ranch area last year. About 23,500 skiers used the Snow Bowl last winter. He felt that the burning of the cabin, and two other structures near Hart Prairie, was caused by snowmobilers rather than skiers. Hart Prairie is a popular snowmobile area, but snowmobile use is not permitted at the Arizona Snow Bowl.

Mr. Wilson also expressed concern over fire risks in the vicinity of this listed property. Any increased fire risk caused by improvements at the Snow Bowl is not likely to affect Fern Mountain Ranch, since with the additional facilities, there will be increased personnel at the Snow Bowl to manage and control the visiting public. Present visitation patterns focus on the Lodge, lift, trail to the top of the Peaks, and Picnic Area. No change is expected in this pattern. There is little danger of a fire originating in this area getting out of control. Although Fern Mountain Ranch and the Snow Bowl are in an area classified as a high fire risk, fire statistics for the last 7 years indicate a low fire occurrence. What few fires occurred were primarily confined to the Picnic Area and remained small. If a fire from the permit area should get out of control, it would tend to burn uphill, which is away from the Ranch. This tendency is increased by the prevailing southwesterly winds that would push the fire away from the Ranch.

Any introduction of audible, visual, and atmospheric elements from construction in the permit area would be insignificant and not cause a change in the historical qualities of the site. Noise from chain saws used to cut trees during some phases of the construction may be heard at the Ranch, but will be the same noise presently heard in the area during logging activities and firewood cutting. Construction noise and dust will be of short duration and will not effect the National Register quality of the ranch. Once the road is paved, there will be less noise and dust caused by traffic using the road than there is at the present time.

With full construction of all proposed facilities, there will be some difference in the visual backdrop as viewed from the Fern Mountain Ranch (Attachments 4 and 5). This will be caused by the removal of vegetation to construct new ski runs. The visual appearance resulting from tree removal will be softened by careful visual planning and construction of the ski runs as described in the Final Environmental Statement.

Furthermore, the visual setting of the site is not mentioned in the National Register nomination of the Ranch as a significant quality of the site, nor does the history of the Ranch indicate its location was selected because of its visual setting. Ski runs have formed part of the surroundings of the Ranch for the last 40 years and skiing as an activity has been visible from the Ranch for about 50 years (Coconino National Forest 1979:29). Furthermore, the Ranch derives significance from its historic use as a public place, both as a lunch stop for travelers on the Flagstaff to Grand Canyon Stage Route and as a working ranch to breed and sell Arabian horses.

In summary, the proposed development will not change the historic features of the site as described in the National Register nomination form. It is our conclusion the proposed Snow Bowl improvements will have no reasonably foreseeable effect on the National Register qualities of Fern Mountain Ranch.

D. *National Register Eligibility of the Peaks Themselves.*

Under 36 CFR 800.4(a), Federal agencies are responsible for identifying listed or eligible properties which are located within the area of the undertaking's potential environmental impact and may be effected by the undertaking. The area we are considering consists of the Snow Bowl Road, a 30-foot width on both sides of the Snow Bowl Road, and the permit area itself. Evaluation of a larger area, if not within the area of the undertaking's potential environmental impact, is not required under 36 CFR Part 800.

In this instance, we are addressing the issue of the indeterminately larger area of the Peaks in accordance with the remand in the lawsuit over the proposed Snow Bowl improvement. In this remand, the Forest was directed to consult "with the State Historic Preservation Officer to determine if the Peaks *themselves* are eligible for inclusion in the National Register" (emphasis added). In this light, we have applied the Criteria for

Evaluation (36 CFR 1202.6) and other relevant provisions and it is our conclusion that as an entity *themselves*, the San Francisco Peaks are not eligible for nomination to the National Register of Historic Places.

The criteria for evaluation of properties for possible inclusion in the National Register are listed in 36 CFR 1202.6. Criteria *considerations* in that section, which are used to determine applicability of the Criteria for Evaluation, exclude religious properties from eligibility for the Register. Specifically, section 1202.6 states in relevant part that "Ordinarily . . . properties used for religious purposes . . . shall not be considered eligible for the National Register. However, such properties will qualify . . . if they fall within the following categories . . . " Seven categories are then listed. Unless one of these categories applies to the Peaks as an entity, the Criteria for Evaluation are not reached, and therefore the Peaks would not be eligible under the authorities which apply.

Before reviewing the seven categories which will qualify an otherwise excluded religious property, such that the Criteria for Evaluation would then apply, we will discuss our understanding of the Peaks as a religious property.

While we recognize the importance of the Peaks to Native Americans, as well as to other elements of the American people, the Peaks' significance is, in fact, primarily religious, as opposed to historical in character. This matter has been considered very carefully in light of the specific direction of the remand. The religious basis to Native values is documented by the extensive literature on this subject, as well as by the numerous testimonies given by the Native Americans during public hearings and the court case concerning proposed developments on the Peaks. Examination of this voluminous record demonstrates that Native American traditional associations are founded on their religious beliefs and feelings toward the San Francisco Peaks. Furthermore, contemporary religious beliefs and practices, as expounded in great detail in the record in the lawsuit,

appear to be interdependent with religious beliefs and practices which have evolved throughout the course of Native American existence. We have been given to understand Native American religion as a continuum, whose past beliefs and practices reach directly into the present rather than being frozen in history and no longer relevant to current beliefs and practices. Thus, we understand that any historic religious beliefs and practices associated with the Peaks are in fact an integral and living part of today's Native American religious ethic.

We now address the seven categories, (a) through (g) established by 36 CFR 1202.6, which are exceptions to the Register's eligibility exclusion concerning properties used for religious purposes. Categories (a), in part, (b) through (e) and (g) pertain to man-made features such as buildings, graves, cemeteries, or a property achieving significance within the past 50 years. The Peaks do not fit within these categories of man-made features and thus these exceptions are not applicable. Categories (a) and (f) will be analyzed here for possible applicability.

The specific instance of category (a), where a religious property will qualify for National Register consideration if it is a "religious property deriving primary significance from . . . historical importance," (emphasis added), does not apply to the case at hand. As detailed above, as *an entity themselves*, religious significance *is* the *primary* significance of the Peaks, relative to the procedures to be applied under Title 36, CFR Parts 800 and 1202. Historical importance, if any, is far secondary to religious significance.

Category (f) applies to "property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own *historical* significance" (emphasis added). Our review of the record does not bear out a commemorative intent or association with this religious property. Likewise, the symbolic value of the Peaks is a religious symbol of contemporary impact. It is important to note that the religious significance of

the Peaks differs considerably from that associated with other religious sites eligible or nominated to the National Register under applicable categories. Such sites are associated with specific, major events or with ceremonies in which large groups participate. The Peaks have a more generalized nature as being a place of power or having influence on the balance and well being of the world. Religious practices on the Peaks primarily involve supplication by individuals or small groups. In applying category (f) as a valid exception for religious properties, one could use as an example the Old North Church in Boston, which is a religious property with a historical association listed within the Boston National Historical Park and included as a result of the exceptions concerning historical importance and commemorative intent.

Although there are differences in opinion regarding potential use of the Peaks, the issue is not appropriate to resolution under the National Historical Preservation Act. It is clear from the statements of the plaintiffs in the lawsuit that the central issue is the effect of the proposed project on contemporary religious uses of the San Francisco Peaks. The Peaks, in this instance, derive their *primary* significance from religious values, not from historical importance; hence the Peaks do not meet the criteria for evaluation and are not eligible for inclusion in the National Register as an entity themselves.

At this stage in the planning process, we have adequate information and inventory data to assess the effects to cultural resources by the proposed project. All areas proposed for construction, the Snow Bowl permit area, and the Snow Bowl Road have been inspected and evaluated (Clements 1981, Kelley 1980, Stein and Pilles 1981a, 1981b) and in making our determinations, we have consulted with your office, Native American affidavits and testimonies, numerous publications and maps (Attachment 6), and also knowledgeable and interested people outside our Agency (Attachment 7).

Pursuant to Title 36, CFR Part 800 and 1204, we request your comments and concurrence at your earliest convenience. Upon receipt of your response, we will forward the documentation to the Chief of the Forest Service for his consideration and final agency decision.

Sincerely,

NEIL R. PAULSON
Forest Supervisor

Reply to 2360 Special Interest Areas September 18, 1981

Consultation with Arizona SHPO on
Arizona Snow Bowl Expansion

To: Chief

Enclosed is a letter dated September 11, 1981, from the Arizona State Historic Preservation Officer (SHPO) relative to the consultation process required under 36 CFR 800. Specifically the letter is the SHPO's response to your request on August 17, 1981, as relayed by Supervisor Neil Paulson, for consultation on the effects that the proposed expansion of the Arizona Snow Bowl might have on properties listed in the National Register of Historic Places or on properties eligible for such listing. The Forest Service findings, as documented in Mr. Paulsen's letter were that there would be no effect on such properties.

The SHPO's letter documents the consultation process and concurs in the determination that the proposed expansion will have no effect on National Register or eligible properties.

It is recommended that you, as "agency official," accept the findings that the area of the undertaking's potential impact is the 777 acres, that the peaks are not eligible for listing in the Register, and that there will be no effect on the two properties presently listed in the Register; and then proceed to issue a formal finding of "no effect" as provided in 36 CFR 800.4 (b) (1).

M. J. HASSELL
Regional Forester

Reply to 2360 Special Interest Areas September 16, 1981

Consultation with Arizona SHPO
on Arizona Snow Bowl Expansion

To: Regional Forester

On August 17 we conveyed, on behalf of Chief Peterson, a letter to the Arizona State Historic Preservation Officer requesting her consultation pursuant to 36 CFR 800, on the Arizona Snow Bowl. Her response has been received and is enclosed for transmittal to the Chief who is the Agency Official for this undertaking.

NEIL R. PAULSON
Forest Supervisor

APPENDIX "H"

Letter-Opinion of the Arizona State
Preservation Officer: NHPA Remand

Proceedings dated September 11, 1981

Mr. Neil R. Paulson
Forest Supervisor
Coconino National Forest
U.S. Dept. of Agriculture
2323 E. Greenlaw Lane
Flagstaff, AZ 86001

Re: Arizona Snow Bowl Expansion Proposal
Special Use Permit DOA - Coconino National Forest

Dear Mr. Paulson:

On 8-17-81 you submitted documentation regarding compliance with the historic preservation requirements for this proposed Federal undertaking, pursuant to the 36 CFR Part 800 regulations of the Advisory Council on Historic Preservation ("Protection of Historic and Cultural Properties"). We have now completed our review of the documentation and have the following comments:

Section 800.4 (a) "Identification of National Register and Eligible Properties" –

Section 800.4 (a) (1) –

The Forest Service consulted with the SHPO and we agreed that the only listed National Register properties located within or in the vicinity of the project area are the Fern Mountain Ranch and C. Hart Merriam Base Camp, both of which are located outside the permit area to the northwest of the Peaks.

Cultural resource surveys in the area of the undertaking were conducted to locate and identify any historic properties that may be eligible for inclusion in the National

Register. The permittee (Northland Recreation, Inc., and Arizona Snow Bowl) had two cultural resource surveys carried out by Northern Arizona University archaeologists (NAU Proj. No. 317-AZ-I and NAU Proj. No. 493-AZ-I). Additionally, Forest Service archaeologists sample surveyed portions of the permit area and intensively surveyed the Arizona Snow Bowl road area (reports No. 81-54 and 81-60). From these survey investigations two archaeological resources were recorded. Site AR-03-04-03-199 was identified as the remains of the old Snow Bowl lodge built c. 1941 and destroyed by fire in February, 1952. Site AR-03-04-03-295, located outside the area of potential project impact, was identified as a "possible" man-made rock arrangement that could be the remains of a "field house" of unknown age and cultural affiliation.

Section 800.4 (a) (2) –

Regarding the appropriate level of effort "in identifying eligible properties that are within the area of the undertaking's potential environmental impact and that may be affected by the undertaking," we are in agreement that these four cultural resource surveys encompass all of the areas within the permit area that would be directly affected by the proposed Snow Bowl expansion activities. It was also determined during the consultation that the Forest Service would further consider the potential National Register eligibility of the San Francisco Peaks area itself, since the permit area is a part of the Peaks.

Section 800.4 (4) (3) –

In evaluating the National Register eligibility of the cultural resources identified from the surveys, the Forest Service and SHPO applied the Criteria for Evaluation (36 CFR 1202.6) and we concur that the one (1) identified site located within the permit area (AR-03-04-03-199) does

not meet the criteria for inclusion in the National Register of Historic Places. It is our opinion that the old Snow Bowl lodge site lacks any potential to yield further information important in history and that none of the other National Register Criteria apply.

In evaluating the potential National Register eligibility of the San Francisco Peaks as one entity, the Forest Service, in the documentation submitted, made the determination that the San Francisco Peaks do not meet the criteria for inclusion in the National Register of Historic Places. We have the following comments on the case made for that determination:

1) The inclusion that the possible significance of the Peaks, in terms of the National Register criteria, lies only in the Native American values, is, in our opinion, too narrow a view and is not supported by evidence to the contrary. It can be documented that the Peaks area was a natural landmark for historical explorers, travelers and the early settlers in that area. Historical recognition and use of the Peaks has not been limited to the historic and modern Hopi and Navajo people and their ancestors.

2) The argument that the significance of the Peaks to Native Americans is primarily religious *as opposed* to historical seems to be more spurious than productive. The Peaks area has had a long-standing place of importance in the history of the Hopi and Navajo and while they may attach primarily religious values to the Peaks, the *historical* aspects of those views cannot be ignored.

In our own evaluation of the eligibility of the San Francisco Peaks, as one entity, for inclusion in the National Register of Historic Places, we have carefully reviewed the Criteria for Evaluation (36 CFR 1202.6). It is our opinion that the San

Francisco Peaks, as one entity, do not meet the criteria for inclusion in the National Register as the criteria is currently defined. Although we concur with the Forest Service in the determination that the Peaks as one entity are not eligible, our evaluation is based on different considerations. The justification for our determination is as follows:

> Of the categories of properties that are eligible for inclusion in the National Register (i.e., districts, sites, buildings, structures, and objects), only the two categories of "sites" and "districts" could apply to the Peaks as one entity.
>
> A *site* is defined as " . . . the location of a significant event, a prehistoric or historic occupation or activity, . . . " (p. 6, NPS Publication Number 189). The emphasis is on identifying a specific locus or several loci (in the case of a district) where the event, occupation or activity took place. The identification of a specific locus of physical space usually involves recognizing some tangible evidence of where such events or activities took place. For example, the C. Hart Merriam Base Camp, located in the Peaks area, is listed on the National Register to commemorate the event and activity of C. Hart Merriam's scientific studies of the Peaks area through the tangible association with the site of the Base Camp. In the case of the Peaks, while there may well be specific loci on the Peaks that can be identified from tangible evidence as sites, the Peaks as one entity, do not conform to the criteria definition of a "site" as it is currently used in identifying National Register properties. Further, an examination of the sites listed and/or determined eligible indicates that sites may be eligible for associative value with a specific event or activity commemorating a significant single event, activity or occupation, such as the signing of a treaty or the scene of a battle; or sites may be eligible that achieve significance through association with a

special continued, repeated, or 'ritual', event, activity or occupation. As regards the latter, the "Peaks" might be considered a site in terms of Native Americans' use and association. However , in our view there must be a more specific identifiable locus of physical space that represents the event, occupation, or activity before an area can be designated a "site." As an analogy in archaeological terms, while one might view the entire middle Salt-Gila Rivers area as one large prehistoric Hohokam archaeological site (or district of sites), this is not a realistic or practical approach to identifying and recording sites (or districts) for research and preservation. Instead, more manageable discrete loci are singled out where prehistoric events, occupation, or activities can be specifically identified and delineated in physical space.

For the Peaks area, it is our view that if the Native American uses of the area can be identified as discrete loci, such as shrines, trails, collecting areas, etc., those areas should be considered as potential "sites" in the National Register classification system.

A *district* is defined as " . . . a geographically definable area, urban or rural, possessing a significant concentration, linkage or continuity of sites . . . united by past events . . . " (p. 6, NPS Publication Number 189). Using this definition, the documented information on the Peaks does not provide evidence to satisfy a district designation within the National Register classification system. Although there may exist significant individual properties within the Peaks area, a concentration, linkage, or continuity of sites united by past events has yet to be demonstrated. We do know that, within the 777 acre permit area, there is no evidence for the existence of any significant sites that might be part of a definable district. However, the possibility still remains that a historic district could be identified within the Peaks area. For example, there may be specific sites on the east side of

the Peaks and at the summit areas representing some of the Native American uses of the area that collectively would qualify as a potential historic district. Other historic (and prehistoric) sites may also be found within the Peaks area that would be part of such a district. However, additional research and extensive field investigation of the entire Peaks area would be necessary before any potential National Register district could be identified that would have a justifiable boundary for National Register evaluation.

Thus, it is our opinion since there is no evidence that the permit area contains sites that might be part of a potential historic district, it is not necessary for the Forest Service to further consider other areas of the Peaks in connection with this proposed undertaking. The Forest Service should, of course, continue to carry out its responsibility for inventorying and protecting any significant cultural resources located outside of the permit area.

Section 800.4(b) "Determination of Effect" –

In consultation meetings of June 26 and August 3, 1981 the effect the proposed action might have on National Register or eligible properties was reviewed. It was agreed that the Forest Service would further consider any potential direct or indirect effects to the Fern Mountain Ranch and C. Hart Merriam Base Camp National Register properties.

On August 5, 1981 this was reviewed further with an on-site inspection to view the situation from both the perspective of the permit and and from the two National Register properties themselves. We were specifically examining whether the undertaking might cause any change in the integrity of location, feeling, or association that contributed to the qualities which qualified these two properties for inclusion in the National Register.

After carefully considering the Criteria of Effect (Section 800.3(a)), we concur with the Forest Service's deter-

mination that the proposed undertaking will have no direct or indirect effect on the qualities which qualified these two properties for inclusion on the National Register. Our decision was based on the review of possible visual impacts to the setting of the Fern Mountain Ranch and the possible indirect impacts that might be likely to occur with the increase in the number of people using the Snow Bowl facility. Further, our inspection established that the C. Hart Merriam Base Camp property lies clearly outside any zone of potential project impact. It is not possible to visually identify the Base Camp area from the Peaks, and the Snow Bowl area cannot be seem from the Base Camp. In addition, since the Base Camp site is indistinguishable from other similar clearings in the Forest with a spring, there is little threat of vandalism and no justification that the site would attract any additional visitors from the Snow Bowl area.

Therefore, since we have now determined through consultation that there are no National Register eligible properties within the area of the project's potential environmental impact, we are in concurrence with a "Determination of No Effect," pursuant to Section 800.4 (b) (1), for this proposed undertaking.

This letter documents the Forest Service's formal consultation with the SHPO regarding this proposed undertaking. Pursuant to 36 CFR 800.4 (b) (1), all documentation regarding a Determination of No Effect should be available for public inspection. Our files regarding this determination are available to anyone wishing additional information, and we would be appreciative if the Forest Service would notify us of all inquiries or comments regarding our determination.

We look forward to your continued cooperation, and if you have any questions, please contact me or Frank Fryman of my staff.

Ann A. Pritzlaff / State Historic Preservation Officer

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APPENDIX "I"

Decision of the Chief Forester: NHPA
Remand Proceedings dated September 22, 1981

Reply to 2360 Special Interests Areas September 22, 1981

Consultation with Arizona SHPO on
Arizona Snow Bowl Expansion
(ref. your 9/18/81 ltr.)

To: Regional Forester, R-3

I have reviewed and considered the documents submitted including the Forest Supervisor's August 17, 1981, letter to the Arizona State Historic Preservation Officer and their September 11 response regarding our cultural resource obligations associated with the proposed expansion of the Arizona Snow Bowl. These letters serve to document the consultation process conducted pursuant to Title 36, Part 800 of the Code of Federal Regulations (36 CFR 800).

Based on the analysis and rationale included in these letters, following is a summary of my findings:

A. The area of the undertaking's potential environment impact includes the 777 acres within the permit area boundaries, the Snow Bowl road, and the strip of land 30 feet on either side of the road.

B. There are no National Register listed or eligible properties within the area of the undertaking's potential environmental impact.

C. The proposed Snow Bowl expansion will have no reasonably foreseeable effect upon the values that qualified the C. Hart Merriam Base Camp and the Fern Mountain Ranch for listing on the National Register.

D. As an entity, the geographic area know as the San Francisco Peaks is not eligible for nomination to the National Register.

E. There will be no effect upon cultural resources from the proposed undertaking.

This constitutes the final administrative determination of the Forest Service and concludes the consultation process pursuant to 36 CFR 800. Please arrange to make this letter and the related documentation available to the public for their review. Parties who offered comments or with whom the Supervisor may have consulted should be furnished copies.

R. M. Housley
Deputy Chief

APPENDIX "J"

Judgment of the Court of Appeals and
Orders Denying Rehearing and Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

SEPTEMBER TERM 1982

Civil Action No. 81-00558

No. 81-1905

May 20, 1983

Richard F. Wilson, et al.

Appellants,

v.

John R. Block, Secretary of Agriculture, et al.

Appellees.

And Consolidated Case Nos. 81-1912 and 81-1956

BEFORE: Tamm and Ginsburg, Circuit Judges; and Lumbard,* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

JUDGMENT ENTRY

Clerk's Docket Entry, May 20, 1983

Judgment by this Court that the judgment of the District Court is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

FOR THE COURT:
George A. Fisher, Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

SEPTEMBER TERM 1982

Civil Action No. 81-00481

No. 81-1912

July 14, 1983

The Hopi Indian Tribe

Appellant,

v.

John R. Block, Secretary of Agriculture, et al.

Appellees

And Consolidated Case Nos. 81-1905, 81-1956, 82-1705 and 82-1706

BEFORE: Tamm and Ginsburg, Circuit Judges, and Lumbard,* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

ORDER

On consideration of the Petition for Rehearing of Appellant, filed June 23, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

FOR THE COURT:
George A. Fisher, Clerk

By: Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
SEPTEMBER TERM 1982

Civil Action No. 81-00481

No. 81-1912

July 14, 1982

The Hopi Indian Tribe

Appellant,

v.

John R. Block, Secretary of Agriculture, et al.

Appellees

And Consolidated Case Nos. 81-1905, 81-1956, 82-1705 and 82-1706

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges and Lumbard,* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed June 23, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

FOR THE COURT:
George A. Fisher, Clerk

By: Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

SEPTEMBER TERM
1982

Civil Action No. 81-00558

July 26, 1983

No. 81-1905

Richard F. Wilson, et al.

Appellants

v.

John R. Block, Secretary of Agriculture, et al.

Appellees.

And Consolidated Case Nos. 81-1912 and 81-1956

BEFORE: Tamm and Ginsburg, Circuit Judges; and Lumbard,* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

ORDER

On consideration of the Petition for Rehearing of the Navajo Medicinemen's Association, et al., filed July 6, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

By: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

SEPTEMBER TERM
1982

Civil Action No. 81-00558

July 26, 1983

No. 81-1905
Richard F. Wilson, et al.

Appellants

v.

John R. Block, Secretary of Agriculture, et al.

Appellees

And Consolidated Case Nos. 81-1912 and 81-1956

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges; and Lumbard,* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

ORDER

The Suggestion for Rehearing *en banc* of the Navajo Medicinemen's Association, et al., filed July 6, 1983 has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

By: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

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APPENDIX "K"

Letter-Comments of the Western Division Chief of the
Advisory Council on Historic Preservation
NHPA Remand Proceedings dated September 17, 1981

Mr. Neil R. Paulson
Forest Supervisor
Coconino National Forest
2323 East Greenlaw
Flagstaff, AZ 86001

Dear Mr. Paulson:

Recently the Council has been provided information from John MacKinnon and Douglas J. Wall which suggests that the historic resources of San Francisco Peaks area may be eligible for inclusion in the National Register. This information is in sufficient detail to raise a valid question as to the eligibility of these historic properties. Therefore, pursuant to Section 800.4(a)(3) of the Council's regulations, "Protection of Historic and Cultural Properties" (36 CFR Part 800), we recommend that you request a determination of eligibility from the Secretary of the Interior in accordance with 36 CFR Part 63.

Should the Secretary of the Interior find these historic properties are eligible for inclusion in the National Register the Forest Service is responsible for determining, in consultation with the Arizona State Historic Preservation Officer, if its proposed actions with respect to the enlargement of the Ski Bowl development will affect the eligible properties. If there will be an effect the Forest Service must afford the Council an opportunity to comment pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended, prior to approving any action that would affect the eligible property.

Please investigate this matter to determine whether the property is eligible for the National Register and if your agency's involvement requires obtaining the comments of the Council pursuant to Section 106. Section 800.4 of the Council's

regulations sets forth the agency's responsibilities. We look forward to hearing from you as soon as possible. If you have further questions, please call me at (303) 234-4946, an FTS number.

Thank you for your cooperation.

Sincerely,

Louis S. Wall
Chief, Western Division

APPENDIX "L"

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Pacific Southwest Region
Box 36098 / 450 Golden Gate Avenue
San Francisco, California 94102

Dated August 23, 1978

Mr. Michael A. Kerrick
Forest Supervisor
Coconino National Forest
2323 East Greenlaw Lane
Flagstaff, Arizona 86001

Dear Mr. Kerrick:

The Department of the Interior has reviewed the draft environmental statement for the Arizona Snow Bowl Ski Area proposal, Coconino National Forest, Arizona. We offer the following comments for your consideration.

Based on the information contained in the statement and our knowledge of the project area, it appears that expansion of the Snow Bowl Ski Area could have adverse effects on Indian religious values, cultural resources, visual quality, mineral resources, and rare and endangered species. Once any given development plan is selected, the range of actions available to the Forest Service for avoiding or minimizing these impacts is greatly reduced. Therefore, a detailed discussion of the probable environmental effects of each alternative plan is needed at this stage of decision-making in order to avoid or minimize impacts at the earliest stages of planning. The sketchy tabulation of impacts provided in the statement is inadequate for this purpose.

Quantification of impacts is not presented for several environmental parameters. Examples are the lack of data on user-days in the summer season, types of vegetation to be seeded on disturbed areas, and wildlife species to be affected by development. The statement should justify the predictions of environmental impact summarized in Section III by giving relevant quantified data, and should discuss and interpret these data in an objective, scientific manner.

The wildlife resources section (page 25) is not given equal consideration when compared to the vegetation, geology, and climate sections. A better understanding of ecological relationships could be achieved if representative lists of species occurring on the permit area were presented. These lists should not only include birds and mammals, but all wildlife of the area. Several species which are not mentioned in the statement are listed as occurring in the area by the Forest Service publication *Unique Wildlife of the Southwestern Region* (Wildlife Technical Bulletin No. 2, 1975). "Unique" species should be considered in the discussion to avoid or minimize disturbance to these species.

The description of environmental impacts of the alternatives on wildlife resources and their habitats, as presented on pages 89 and 90, is much too general. The description of these impacts should be discussed in greater detail and specifically relate to the description of wildlife resources on page 25. For example, in item III-B.1.6, page 101, it is stated that development of Road B would increase people pressure on wildlife, as compared to Road A. However, the document contains no description of what increased people pressure might mean to area wildlife populations.

Seven plant species which have been proposed for listing as endangered plants under the Endangered Species Act of 1973 could be affected by ski area expansion. Since the San Francisco Peaks are ecologically unique, any endangered species habitat that occurs on this "island" must be considered espec-

ially critical and irreplaceable. Since the alternatives presented call for varying degrees of development, their effect on endangered species habitat should be taken into account during plan selection, not merely during implementation.

The statement notes in item III.A.13, page 90, and again in item III.B.12, page 102, that measures would be taken to document the occurrence of threatened and endangered species in the proposed project area. This lack of data should also be noted in Sections I.B.7 and I.B.10, since it is difficult to properly assess impacts without this information. In addition, the grazing permit discussion should be clarified, as the numbers are confusing.

Archaeological concerns are not addressed. This is particularly important with respect to Alternatives 3, 4, 5, and 6, which will require new construction and/or land modification rather than expansion of existing facilities. It should be noted that the original development of the Arizona Snow Bowl and associated recreation areas occurred a number of years ago—prior to the mandates of NEPA and Executive Order 11593 for cultural resource surveys and inventories. Thus it is all the more important that these areas be examined and archeological concerns be addressed in the final EIS. The "Assessment of Aesthetic, Cultural and Religious Impacts of Snow Bowl Expansion" merely recaps the impacts in Section III and provides no new data or analysis to justify its title.

There are several steps short of actual field survey that can be taken to make preliminary identifications of cultural resources in the project area. The National Register of Historic Places, both the annual edition and monthly supplements, should be consulted first for sites that have been recognized as significant to local, state or national archeology, architecture, history, or culture. A cursory check shows that the C. Hart Merriam Base Camp National Historic Landmark is in the project vicinity. Dr. Merriam's work on Life Zones in the San Francisco Peaks was a milestone in early ecological study.

As a second step in the process mandated by Executive Order 11593 and the "Procedures for Protection of Historic and Cultural Properties" set out by the Advisory Council on Historic Preservation (36 CFR 800), Federal agencies must consult with the State Historic Preservation Officer (SHPO). The SHPO can provide information on sites in the project area that have been found eligible for the National Register, that were located but not evaluated in previous surveys, or, most importantly in this case, that the area may yet yield. The SHPO can also advise you on the need, extent and design of a survey at this stage of project planning.

Any sites located by the Forest Service must be evaluated against the National Register criteria in consultation with the SHPO, and determinations of eligibility must be requested from the Keeper of the National Register for sites meeting the criteria. Provisions for "District" nominations of cultural resources which have a common theme and significance may be applicable in the case of Snow Bowl or the San Francisco Peaks as a whole.

If the Forest Service and the SHPO find that Snow Bowl expansion would adversely affect a property on or eligible to the National Register, either by physical disturbance, isolation from or alteration of its environment, or introduction of inappropriate elements in its surroundings, the project is subject to Section 106 of the National Historic Preservation Act of 1966. Requirements for consultation with the Advisory Council on Historic Preservation under this Act are set out in 36 CFR 800. Damage to archeological resources in this case would probably result from forest clearing and construction of roads and facilities, as well as from the erosion triggered by these activities.

We note that the National Park Service, in its comments on the 1972 draft San Francisco Peaks Land Use Plan, raised most of the above stated points concerning compliance with Federal regulations on cultural resource protection. These comments

were not addressed in the Final Plan, apparently due to the lateness of their receipt.

By virtue of their unique value for scientific study, the San Francisco Peaks are being considered for National Natural Landmark designation. Designated Natural Landmarks are intended to preserve significant natural features through voluntary owner commitment, and are listed in the National Registry of Natural Landmarks.

The draft statement recognizes the importance of the San Francisco Peaks to the Hopi and the Navajo Tribes. The proposed project would adversely affect the Indians' religious values associated with the area. Native American concerns (especially of the Hopi, whose claims are the strongest) regarding the sacredness of the San Francisco Peaks versus proposed Northland Recreation expansion have been a hot issue in the Flagstaff area for the last five years or more. Part of the debate relates to vandalism, as well as land impacts, e.g., tourists, skiers, locals, etc. who desecrate shrines on the Mountain– carrying away fetishes, kachinas, or other ceremonial objects. Vandalism would increase with additional access and visitation to the Snow Bowl and higher elevations, especially during summer. Since the Hopi and Navajo tribal governments have been provided copies of the draft statement, they will no doubt provide further comments.

The statement should indicate how well the various alternatives conform to the San Francisco Peaks Land Use Plan. Several of the proposed ski area expansion alternatives appear to amount to intensive recreation development on a management area which, according to the Plan, is unsuited for this use. In particular, we note that pages 55-56 of the Plan examine the "intensive recreation" alternative for management of Unit C. The alternative is rejected because of the high susceptibility of Unit C to erosion, the short growing season, unpredictable snow cover, Indian religious considerations, and the danger of triggering infestations by the spruce bark beetle. The upper

half of the permitted ski area appears to encroach into this management unit. A map taken from the Plan would have been helpful in clarifying the location of the ski area in relation to the management unit.

The potential adverse effects of Snow Bowl expansion should be weighed against the need for expanded winter recreation facilities in the region. Page 3 of the "Assessment of Aesthetic, Cultural, and Religious Impacts of Proposed Snow Bowl Expansion" states that skiers from outside Flagstaff presently do not feel Snow Bowl is worth the trip, and that Phoenix skiers have indicated that they will continue to ski elsewhere until Snow Bowl is expanded. The test should discuss alternate ski areas now in use, their accessibility, capacity and facilities, and in general attempt to answer the question of whether the Snow Bowl ski resource has sufficient potential, durability and demand to justify development with likely severe adverse effects.

The amount of environmental damage could be lessened by developing plans with more trails and areas for snowshoeing and cross-country skiing. This would decrease the amount of vegetation cleared and the number of lifts needed. Use of the lifts could also be limited to the skiing season. Summer use would subject the vegetation at the higher elevations to large numbers of hikers, with possible resulting damage during the short growing season.

The impacts of removing the existing facilities on the Flagstaff economy should be discussed and given equal consideration with the beneficial economic impact of development.

The statement should indicate whether water will be hauled from Flagstaff regardless of the alternative selected or whether one or more deep wells, apparently greater than 1,000 feet, may be considered.

The designation "United States Geological Service" should be corrected to *United States Geological Survey* (page 10, paragraph 3).

We suggest that subsequent planning documents on the Arizona Snow Bowl Ski Area consider and include the impacts development would have on mineral resources, and the effect the project would have on such resources and related industries. Volcanic rocks, such as those present in the proposed ski area, are prime prospect sites for basalt rock, volcanic scoria, volcanic cinders, and pumice. Crushed basalt, scoria, and cinders are used for concrete aggregate, roadstone, railroad ballast, riprap, road metal, cinder blocks, and other lesser uses. Pumice, which is found in many volcanic fields near the ski area, was used in the construction of Glen Canyon Dam. Geothermal water, a prospective source of energy, probably is present in much of the region.

Thank you for the opportunity to comment on this statement. If you have any questions regarding these comments, please contact me at (415) 556-8200.

Sincerely yours,

Patricia Sanderson Post
Regional Environmental Officer

No. 83-282

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD F. WILSON AND JEAN WILSON, PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture has authority to issue both term and revocable permits for recreational facilities within national forests.

2. Whether the court of appeals properly ruled that the Forest Service's determination, with the concurrence of the State Historic Preservation Officer, that the San Francisco Peaks did not possess a combination of "unique" attributes qualifying that entire 75,000 acre area for listing on the National Register of Historic Places was not arbitrary and capricious.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50) is reported at 708 F.2d 735. The district court's memorandum opinions (Pet. App. 51-90 and 91-99) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. Petitions for rehearing, filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association in actions consolidated with petitioners' action, were denied on July 14, 1983, and July 26, 1983, respectively (Pet. App. 174-176). The petition for a writ of certiorari was filed August 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Section 1 of the Organic Administration Act of 1897, 16 U.S.C. 551; the Act of Mar. 4, 1915, 16 U.S.C. 497; and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528, are set forth as an appendix to this brief.

STATEMENT

1. Coconino National Forest belongs to the United States. It was established by Presidential Proclamation No. 818 on July 2, 1908 (35 Stat. 2196). Congress has placed the administration of that national forest in the Department of Agriculture, pursuant to the provisions of 16 U.S.C. 482n, 482n-3, 497, 528, 531, and 551.

The San Francisco Peaks is a mountain that encompasses 75,000 acres and rises to 12,633 feet, the highest point in Arizona (Pet. App. 4-5). Ski facilities have existed within a 777 acre portion of the San Francisco Peaks since the mid-1930's (*id.* at 5). During this period, the United States Forest Service built a ski lodge at what is now the Snow Bowl picnic ground, and the Civilian Conservation Corps built a road to the lodge. The present ski lodge was built in 1956. The skiing facility utilized a rope tow as the primary uphill mode of transportation until 1958, when it was replaced by a Poma lift, which is still in use today. A chairlift was installed in 1962. With the exception of some trail widening and small surface installation the 777 acre permit area and facilities at the Snow Bowl have changed very little since 1962. *Ibid.*

The facility has been operated by various parties, and in April 1977 the special permit for the Snow Bowl Operation in the national forest was transferred to Northland Recreation, Inc. (Pet. App. 5). In July 1977, Northland submitted

to the Forest Service a master concept plan for future development within the existing permit area. The plan addressed the need for additional parking, lodge and uphill facilities, and additional slopes of varying skill levels.

In late summer 1977, the Forest Service solicited alternatives to the proposed plan as part of its environmental analysis (Pet. App. 5). Ultimately, the Forest Service selected six alternatives to Northland's proposal, which were analyzed in a draft environmental impact statement. Special efforts were made to solicit comments from the Hopis and Navajos, who regard the area as sacred. *Id.* at 6.

On December 31, 1980, after intermediate administrative proceedings, the Chief of the Forest Service issued a final agency decision. The alternative selected by the Forest Service provided for considerably less development than the master plan proposed by Northland (Pet. App. 133-146). The decision allowed a limited expansion of the Snow Bowl ski area within the existing permit boundaries and allowed improvement of the Arizona Snow Bowl Road under the dual permit system.

Under the dual permit system the Forest Service issues a long-term permit to build major improvements within 80 acres or less for a maximum of 30 years pursuant to 16 U.S.C. 497, together with a revocable permit to build less permanent improvements such as ski trails, under 16 U.S.C. 551, which contains no limitation on acreage.

2. Three suits were filed to prevent the Forest Service from issuing permits to authorize the improvement of the recreational facilities within the Snow Bowl area. The suits by the Hopi Tribe and the Navajo Medicemen's Association allege that the existence of — let alone the expansion of — a ski facility on the San Francisco Peaks violates the Indians' free exercise rights under the First Amendment; the

American Indian Religious Freedom Act, 42 U.S.C. (Supp. V) 1996, an alleged trust responsibility between the federal government and Native Americans, and various environmental laws. In their suits, the Indian plaintiffs sought to have the existing facilities dismantled and removed. Pet. App. 52. Petitioners, the Wilsons, non-Indians who own nearby Fern Mountain Ranch, contend that the Forest Service's proposed actions violated the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, regulations promulgated thereunder, 36 C.F.R. Part 800, and statutes regulating the management of the national forests. Petitioners argued first, that the Forest Service had violated the NHPA with respect to two National Register properties (one being petitioners' ranch) in the vicinity of the Snow Bowl; and second, that the Forest Service did not comply with the Act in declining to include the San Francisco Peaks in the National Register. Pet. App. 75-89.

All parties filed cross-motions for summary judgment. On June 15, 1981, the district court entered summary judgment in favor of defendants on all claims with the exception of that arising under the NHPA (Pet. App. 51-92). The court found that the Forest Service had committed three violations of the NHPA and its implementing regulations. First, the Forest Service had failed to examine the project area to identify properties eligible for inclusion in the National Register of Historic Places. Second, the Forest Service had failed to consult with the Arizona State Historic Preservation Officer (SHPO) about the effect that the alternative preferred by the agency would have on the National Register properties near the Snow Bowl — Fern Mountain Ranch, owned by petitioners,[1] and the C. Hart

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[1]Petitioners specifically argued that since the new ski lifts and slopes would be visible from their ranch, there would be an "adverse effect" under 36 C.F.R. 800.3(b), and the increased tourist traffic would

Merriam Base Camp. Third, the Forest Service had failed, as required by 36 C.F.R. 800.4(a)(1), to consult with the SHPO about the eligibility of the San Francisco Peaks for inclusion in the National Register. The NHPA claim was remanded to the Forest Service, and the Forest Service was enjoined from permitting any improvement of the ski facility pending administrative remand proceedings. After completion of the administrative remand proceedings, the federal defendants filed a motion for entry of final judgment accompanied by a Notice of Compliance; the Indian plaintiffs filed motions under Rule 60(b), Fed. R. Civ. P., seeking relief from the June 15, 1981 judgment. Pet. App. 94-95.

On May 14, 1982, the district court denied the Indians' motions and granted the federal defendants' motion, finding that the agency proceedings on remand had satisfied the requirements of the NHPA (Pet. App. 93-102). Accordingly, the court vacated the injunction that had prevented the Forest Service from issuing the permits for the Snow Bowl improvements. The court of appeals, in a detailed opinion, affirmed (Pet. App. 1-50).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. *The Secretary of Agriculture has authority to issue both term and revocable permits for recreational facilities.* — Petitioners contend (Pet. 10-30) that the court of appeals' decision sustaining the issuance of term and revocable permits under the dual permit system "nullifies" 16 U.S.C. 497. At issue are two permits. One is a 20-year term

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increase the dangers of trespassing, vandalism and arson at their ranch. The Forest Service and the court of appeals analyzed and rejected these contentions. Pet. App. 39-40.

permit issued pursuant to the Act of Mar. 4, 1915, 16 U.S.C. 497. This permit provides for the use of 24 acres of national forest land for ski lifts and tows, shelters, a lodge, and a shuttle bus system. All permanent structures are confined to this 24 acre area. The second permit is a revocable permit issued pursuant to the Act of June 4, 1897, 16 U.S.C. 551. It provides for the use of 753 acres for ski slopes and trails. Petitioners argue that the 80 acre limitation set out for term permits by the Act of Mar. 4, 1915 (16 U.S.C. 497) limits the Forest Service's authority to issue permits for recreational uses to 80 acres.

The Secretary's authority is derived from Congress' plenary power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3. *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954). This power is delegable and has here been delegated to the Secretary of Agriculture. See, *e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336-338 (1963).

Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. The Multiple-Use Sustained-Yield Act of 1960 directs him to accomplish this by balancing many potential uses of national forest lands: outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C 528. He is authorized to issue 30-year leases for up to 80 acres of national forest to be used for "hotels, resorts and any other structures or facilities necessary or desirable for recreation." 16 U.S.C. 497. He has, in addition, power to permit the use of larger areas of the public domain through nonexclusive, revocable special use permits for such purposes as ski slopes and attendant equipment, so long as that is consistent with national forest purposes. 16 U.S.C. 551.

Petitioners claim that Section 551 does not allow the issuance of permits for recreational purposes (Pet. 12). As support for this sweeping proposition petitioners rely on *United States* v. *New Mexico*, 438 U.S. 696 (1978), in which this Court held that the United States did not have the power to reserve use of the water of the Rio Mimbres for the Gila National Forest. The Court ruled that the Organic Administrative Act of 1897, of which Section 551 is a part, allows reservation of national forests only for the purpose of conserving waterflows or furnishing a continuous supply of timber, and not for recreational or other purposes.

United States v. *New Mexico, supra*, however, is inapposite to the instant case. What is at issue here is not whether the United States can *reserve* land or water for recreational purposes, but whether it can allow national forest lands, already properly reserved, to be *used* for recreational purposes. In *New Mexico*, the Court noted that the Multiple-Use Sustained-Yield Act of 1960 made it clear that the purposes for which national forest lands can be administered are broader than the purposes for which they can be reserved. 438 U.S. at 713. Congress has specifically stated that recreation is one of the purposes for which the National Forests are to be used. 16 U.S.C. 528.

Moreover, the Secretary's power to issue revocable recreational permits under Section 551 is supported by long and recognized administrative practice. From the early part of the twentieth century Congress has recognized that the Secretary could issue permits for recreation. See 52 Cong. Rec. 1787 (1915) (remarks of Rep. Hawley). More recently, in 1956, Congress recognized that the Secretary "now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551)." H. R. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956). The issuance of revocable permits under Section 551 in conjunction with

issuance of more permanent permits under Section 497 is also of long standing. In approving the practice of issuing dual permits to ski resort operators, the Ninth Circuit noted that at that time there were at least 84 recreational developments on national forest lands which combine use of a fixed-term lease for lands on which permanent structures are erected and a revocable permit for surrounding lands used for recreation.[2] *Sierra Club* v. *Hickel*, 433 F.2d 24, 35 (9th Cir. 1970), aff'd on other grounds, 405 U.S. 727 (1972). In the instant case, the court of appeals, citing S. Rep. 94-1019, 94th Cong. 2d Sess. 8 (1976), noted that "[t]here are presently about 200 ski developments in national forests and most of them employ dual permits" (708 F.2d at 759; Pet. App. 48).

After a lengthy discussion of the history of the Secretary's practice of issuing recreational permits and congressional approval of it, the court of appeals wrote (Pet. App. 47):

> We conclude, then, that the Secretary has consistently interpreted the Act of 1915 as *not* limiting his authority to issue revocable permits under the Act of 1897; that Congress has for decades had knowledge of the Secretary's interpretation, but has never objected;

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[2]Some recreation projects, the Ninth Circuit noted, 433 F.2d at 35, exceeded 6,000 acres. The Forest Service has, since 1908, authorized issuance of revocable special use permits for such uses as residences, farms, dairies, schools, churches, telephone and telegraph lines, stores, saw mills, factories, hotels, summer resorts, dams, reservoirs, water conduits and power lines. Many such structures were costly. As of 1908, the Forest Service had granted approximately 63,000 term and revocable permits authorizing 80 different uses of national forest lands. At the 1967 hearings, the Associate Chief of the Forest Service explained that approximately 53,000 of these permits involved improvements whose value was estimated to exceed $1 billion. *Management Policy and Other Problems of the National Forests, Hearings Before the Subcomm. on Forests of the House Comm. on Agriculture*, 90th Cong., 1st Sess. (Pt. 2) 2-4 (1967).

> and that on the one occasion when Congress did comment on the Secretary's interpretation and practice, in 1956, it expressed approval. Under these circumstances the Secretary's authority to issue revocable permits under § 551, whether or not exercised in connection with dual permits, cannot be doubted.

In this context, surely, the court of appeals was plainly correct in sustaining this long-standing administrative practice. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. *The court of appeals properly sustained the determination by the Forest Service and the State Historic Preservation Officer that the entire San Francisco Peaks were not eligible for listing.* — Petitioners challenge the decision not to designate the San Francisco Peaks as an entry in the National Register on two grounds. Petitioners first complain (Pet. 28) of the failure to submit the question of the eligibility of the San Francisco Peaks for inclusion in the National Register to the Secretary of the Interior. They contend that this failure violates regulations that explicitly make him the final arbiter when the Forest Service and the SHPO disagree. 36 C.F.R. 63.2(c). The short answer, as the court recognized (Pet. App. 40-41), is that, because both the Forest Service and the SHPO agreed that the property was not eligible, there was no need to refer the matter to the Secretary of the Interior. No disagreement existed for him to resolve.

Petitioners' second contention is that the agency and SHPO abused their discretion in determining that the Peaks did not possess the requisite "unique" attributes for listing on the National Register. The court of appeals properly declined to substitute its discretion for that of the adminstrative decisionmakers. This fact-bound issue presents nothing for further review. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Act of Mar. 4, 1915, 16 U.S.C. 497 provides:

> The Secretary of Agriculture is authorized under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining building, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests.

2. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 provides:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

3. Organic Administration Act of 1897, 16 U.S.C. 551 provides:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or

both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of title 18.

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Acting Assistant Secretary of Agriculture for
National Resources and Environment,
Department of Agriculture; and
NORTHLAND RECREATIONS, INC., an Arizona corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

A. The 16 U.S.C. §497 Land Use Permit Issue

The dual permit practice is nothing more than an ad hoc, departmental device by which hundreds of thousands of acres of public, national forest land is alienated to private entrepeneurs contrary to the plain will of Congress manifested in 16 U.S.C. §497's 80-acre recreation and resort limitation. The sheer amount of public, forest land thus transferred to private use, control and management throughout the United States is itself convincing proof of the substantial, national importance of this issue.

Equally compelling evidence of the far-reaching, national significance of the issue inheres in the ramifications of the Court of Appeals' decision upon the interrelationship of Congress and the Executive Departments in matters of public land dispositions. The 80-acre limit of 16 U.S.C. §497 is one of the clearest and broadest Congressional enactments of limitation extant, and, more importantly, is a conclusive exercise of Congress' plenary power over public land dispositions and regulation under Art. 4, §3, Cl. 2 of the Constitution. In permitting the Executive to circumvent the clear and unqualified acreage limit of 16 U.S.C. §497 (the 80-acre limitation), the Court of Appeals' decision allows an unwarranted intrusion by the Executive into a sphere of governmental power committed by the Constitution's Framers to Congress under circumstances in which the Congress has exercised that power to impose plain and clear acreage limitations upon all types of permits for all recreational uses and developments by private entrepeneurs on national forest lands. As such, Justice Blackmun's dissenting remarks made ten years ago, that "as the Court . . . so plainly reveals, the issues on the merits are substantial and deserve resolution", are equally true today. *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972)[Blackmun, J., dissenting].

Respondents' plea to managerial discretion and plenary power over the forest reserves is both erroneous and misdirected in this case. The Agriculture Secretary's power over government property simply is not plenary but is limited by those granted by Congress and must be exercised within those limits and not otherwise. The Court's precedent indicates that the Secretary is bound by the 80-acre limitation of 16 U.S.C. §497 and cannot circumvent it through departmentally created devices like the dual-permit practice. Recognizing that "neither courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power", the Court has held that in matters respecting the disposition of public lands it "cannot under the guise of interpretation create Presidential authority where there is none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean". *United States v. California*, 332 U.S. 19, 27 (1947); *Confederated Band of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

Respondents' characterization of the Organic Act Special Use Permit as a revocable permit which must be renewed annually is both factually and legally erroneous. The Permit at issue provides under its "Miscellaneous Provisions" that it "shall expire and become void on 5-1-97", not annually as Respondents contend. The Permit cannot be revoked at any time in the discretion of the government because "discretion" under the permit at issue and the Forest Service Manual requires a showing that the land "is needed for a more important public purpose", or that the holder of the permit acted unsatisfactorily in breach of a condition of the permit, or that the "present use has become unsatisfactory". *Forest Service Manual* §2716.3(2)(b)(1)(2). Even upon breach of a condition, the permittee may cure such a breach after notice and avoid revocation. *Forest Service Manual* §2716.3. Elaborate administrative review procedures requiring that the government's action have a rational basis must be followed to effect revocation. 36 *C.F.R.*

§251.60 and 211.19. And, being inextricably tied by the nature of its land use (which cannot stand alone) money, improvements and the unitary recreational purpose of the entire ski area development underlying both permits, the Special Use Permit for ski runs creates a de-facto alienation of national forest lands in favor of private developers exceeding the 80-acre limit of 16 U.S.C. §497 which in fact gives the permittee the same security of tenure provided by that statute and the Term Permit issued under it.

Respondents are simply wrong when they persist in asserting that the 1915 Act provides authority for the issuance of term permits which is in addition to the authority contained in the 1897 Organic Act. The Court specifically rejected this argument in 1978 when it rejected the Government's contention that the 1960 Multiple Use Act, 5 U.S.C. §528, merely confirmed powers which had always existed and held that legislation subsequent to the Organic Act, like the 1960 Act or 16 U.S.C. §497, was "intended to *expand* the purpose for which the national forests should be administered" and thus was essential to create spheres of authority which did not exist and were in fact prohibited by the Organic Act. *United States v. New Mexico*, 438 U.S. 696, 707-708, 713, note 21 (1978), emphasis in the Court's Opinion.

Equally untenable is Respondents' contention that the sole purpose of the 1915 Act was to solve the problem of uncertain land tenure which impeded obtaining adequate financing for privately built improvements on Forest Service land. This departmental and committee interpretation was expressly rejected by the full Congress which itself imposed the original five (5) acre limit because without such a limit, "the Department of Agriculture might let them [the recreational developers] have a hundred or 50 or any amount" of land. 51 *Cong. Rec.* 9101 (1914)[coloquy between Senators Gallinger and Jones]. The acreage limitation of the 1915 Act was thus intended not only to prevent positively the very effects

achieved under the dual-permit practice but also was intended to insure that no more land than that specified in the Act's acreage limit would be stripped of trees and foliage so that "people can go and enjoy the scenery and the fishing and hunting" in "forests that are very beautiful in natural scenery" and "natural wonders". 52 *Cong. Rec.* 1787 (1915)[remarks of Congressman Hawley].

Respondents' assertion that the legislative history of the 1915 Act is devoid of an intent to limit the Secretary's authority to issue revocable permits under the Act of 1897 is thus both wholly wrong and a *non-sequitur*. The Special Use Permit for the Snow Bowl ski runs here simply is not in law or fact a revocable permit, and the Secretary's revocable permit authority, if any, is not truly at issue here. Moreover, no permit of any kind could issue for recreational purposes under the Organic Act of 1897 because, as the Court itself has squarely held, "[n]ational forests were not to be reserved for . . . recreational . . . purposes", and, *a fortiori*, could not be used or occupied for such purposes following their initial creation. *United States v. New Mexico, supra*, 438 U.S. at 707-708.

Respondents' attempt to avoid the logic and reasoning of the *New Mexico* holding is, we submit, unpersuasive. The *New Mexico* holding depended upon a definitive interpretation of the purpose and intent of the 1897 Organic Act, and the Secretarial power claimed here is plainly proscribed by that definitive construction of the 1897 Act. The Court of Appeals' failure even to acknowledge the *New Mexico* holdings' existence led the Court of Appeals to rest its analysis on a premise which squarely conflicts with the *New Mexico* holding which forecloses the argument that a recreational use permit power resided within the 1897 Organic Act which could be "supplemented" by later enactments like the 1915 Act.

Far from legitimizing the dual-permit device through the proverbial bootstrap, Respondents' litany of other uses of

forest lands for a variety of structures and facilities in fact severely erodes, if not vitiates, their argument. All of these uses listed by Respondents were expressly authorized by Congress through legislation enacted specifically to permit each use enumerated by Respondents.[1] The Court itself has specifically recognized that the rights granted under these statutes are described with particularity because the land uses which they permit could not otherwise exist and since a land use not expressly included in such legislation or implicitly essential to the use expressly authorized is forbidden in the national forests. *Utah Power & Light Company v. United States*, 243 U.S. 389, 408 (1917)[16 U.S.C. §522 and §524 (1905)]; *Chicago, M. & St. P. Ry. Co. v. United States*, 218 Fed. 288, 294 (9th Cir., 1915), *aff'd*, 244 U.S. 351, 356-58 (1914).

Under no circumstances does Respondents' contention, that Congress ratified the dual-permit practice when it amended 16 U.S.C. §497 in 1956, have any basis in law or fact. The radical change in the expansion of the 1915 Act's scope to

[1]Through the Act of March 4, 1911 Congress expressly permitted the use of forest lands for telephone and telegraph lines, power poles, power plants and power lines but strictly limited the area of land which could be so used, 36 Stat. 1253-54, 16 U.S.C. §523. Dams, reservoirs, water conduits and the like were expressly authorized through the Act of February 5, 1905, 33 Stat. 628, 16 U.S.C. §524. Schools and churches were expressly authorized by the Organic Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. §479, but were strictly limited to two and one acres, respectively. Hotels and summer resorts were expressly authorized by the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, while sawmills, factories, farms, dairies and other commercial and industrial uses were expressly authorized under the Act of July 28, 1956, 70 Stat. 708, but were strictly limited to 80 acres. Such contempraneous legislation in fact supports Petitioners' view that positively expressed, Congressional authorization was necessary for private use of forest lands which altered the soil, foliage and natural conditions of the reserves. As the Ninth Circuit stated, "it must have been the view of Congress that without these enabling acts" there could be "no right" to use the forest reserves since "otherwise there was no need for their enactment". *Chicago, M. & St. P. Ry. Co. v. United States, supra*, 218 Fed. at 294.

include *"any other . . . facility necessary or desirable for recreation, public convenience or safety"*, 16 U.S.C. §497, emphasis added, precludes application of the doctrine of ratification by amendment and evidences a congressional intent to extend the scope of the recreational land uses subject to the 80-acre limit to the maximum extent possible. Significantly, Congress did not differentiate between the kinds of permits to which the 80-acre limit was applicable nor did it qualify the kinds of recreational uses to which it applied, but instead applied the 80-acre limit to all recreational uses and to all kinds of permits to private developers which involved land uses that were inherently long-term in nature. Contrary to Respondents' assertion, we submit that had Congress believed that the 80-acre limit could be nullified or circumvented, or had its sole concern been the security of a permittee's tenure, it would never have performed the purely futile act of retaining an acreage limitation but would have saved itself time and trouble by omitting any area limitation.

Indeed, as the Petition makes clear, there is no evidence that Congress knew of any administrative practice of permitting the location of major, indispensable facilities like ski runs and lifts on land covered by a supplementary permit, whatever it may have known about the practice of combining term and revocable permits. More importantly, Congress had no notice whatever that any practice of issuing dual permits would continue to occur after the 1956 amendment's enactment. Indeed, the legislative history of the 1956 amendment indicates that nearly three decades of Congressional resistance to an increase in the 1915 Act's acreage limit was overcome only because of the Agriculture Department's representations to Congress that such an increase was necessary precisely because winter sports facilities like ski runs and lifts were subject to the 1915 Act's acreage limit but could not legally exist without an increase in that Act's acreage limit.

Contrary to Respondents' claim, the 1960 Multiple Use-Sustained Yield Act, 16 U.S.C. §528, *et seq.*, neither implicitly

repealed 16 U.S.C. §497's 80-acre limit nor supplies an independent basis of authority under which the dual permit practice, as employed to circumvent the 80-acre limit, can be justified. While the Multiple Use Act created spheres of departmental authority which had never previously existed, *United States v. New Mexico, supra*, 438 U.S. at 713, note 21, the uses specified in that Act were deemed to be "secondary" only. Nothing in the Multiple Use Act or its legislative history indicates that the authority to effect such "secondary" uses as outdoor recreation could be delegated to private entrepeneurs in a manner which would circumvent or nullify the acreage limit of 16 U.S.C. §497 as amended in 1956.

Indeed, the circumstances following the 1956 amendment to 16 U.S.C. §497 and the Court's decision in *Sierra Club v. Morton, supra*, is far more consistent with congressional *disapproval* of departmental devices designed to circumvent the 80-acre limit. Of paramount significance here is the fact that when Congress elected to end the Mineral King controversy at issue in the *Sierra Club* case, it chose to employ the identical language used in the 1956 amendment to 16 U.S.C. §497 to forbid "the development of permanent *facilities* for downhill skiing within the area . . . ". 16 U.S.C. §45f(g), (1978).

At about the same time Congress failed to enact two bills, S. 1338, 95th Cong., 1st. Sess. (1977) and S. 2125, 94th Cong., 2d. Sess. (1975), which would have eliminated the 80-acre limit but which would have required the submission of proposed permits to Congress for at least tacit, though in some cases explicit, approval. These bills were specifically proposed because, as their sponsor, Senator Haskell of Colorado stressed in the floor debates, a strong fear existed among ski area operators and congressmen from states in which large ski areas existed that the dual-permit device was illegal and would be so declared by the courts. 123 *Cong. Rec.* S.6115, April 21, 1977 (daily ed.)[remarks of Senator Haskell]. These bills were passed by the Senate but failed to win House approval. 123 *Cong. Rec.* S. 11729, July 13, 1977 (daily ed.); 123 *Cong. Rec.* 22998 (1977).

These factors coupled with the plain clarity and unqualified scope of 16 U.S.C. §497's 80-acre limit as applied to private, recreational use of national forest land forbids the baptism of the dual-permit practice under the doctrine of congressional acquiescence. Where, as here, the statute is plain and clear and the administrative practice is contrary either to the statute's plain clarity or an obvious congressional intent, "it matters not what the practice of the department may have been *or how long continued*" since "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate". Moreover, 16 U.S.C. §497 is a conclusive exercise of Congress' Property Clause power, and where the administrative practice involves "areas of doubtful constitutionality" only "explicit action by lawmakers", not inaction or acquiescence, can validate such a practice. *United States v. Graham*, 110 U.S. 219, 221 (1884); *Green v. McElroy*, 360 U.S. 474, 507 (1959); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973).

Contrary to Respondents' jeremiad, we do not seek to annihilate all of the nation's ski areas. Our concern is the Snow Bowl and the important principles of the distribution of governmental power involved in the 80-acre issue. We acknowledge that it is easier to exalt expediency over principle where the expedient objects are facilities which provide middle-class pleasure rather than toxic waste dumps, but expediency should never preclude a principled resolution of an important issue like the instant one. Indeed, the Court has never permitted such purely remedial matters to preclude full inquiry into an important issue because its inherent, equitable powers permit it to fashion a decree which affords full relief to a prevailing petitioner but which applies prospectively only as to other similarly situated matters where substantial, inequitable results or the disruption of orderly government so merit. *Cipriano v. Houma*, 395 U.S. 701, 706 (1969); *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, _____ U.S. _____, 98 S.Ct. 2858, 2880 (1982).

Through 16 U.S.C. §497 Congress has struck the balance which it deems appropriate with respect to the amount of national forest lands which a private, recreational developer may use and occupy, and this exercise of Congress' Property Clause power is conclusive upon both the executive and judicial branches of government. Inspite of the fact that the Courts must protect this congressional balance from Executive intrusion, the Courts below have failed to do so, choosing instead to allow the Executive to alienate hundreds of thousands of acres of national forest lands to private developers contrary to the will of Congress. In short, the dual-permit issue is substantial, and the merits of this rarely litigated issue, incorrectly adjudicated by the Courts below, should be reviewed and resolved by this Court.

B. The National Historic Preservation Act Issue.

Congress itself deemed the preservation and protection of even locally significant historical properties according to uniform, nationally applicable criteria to be of substantial, national importance when it created the National Historic Preservation Act and committed its administration to the Interior Department, not the Agriculture Department. 16 U.S.C. §470, §470-1, §470a. The century-old antagonism between the Interior Department and the Agriculture Department's Forest Service over public land jurisdiction simply cannot be allowed to frustrate this Congressional policy.

The best work of Congress in the significant area of protecting the historical and cultural heritage of America simply cannot mean one thing in the Ninth Circuit Court of Appeals and another thing in the District of Columbia Court of Appeals any more than it can achieve any variety of meanings in the District of Columbia itself depending upon which panel of circuit judges is drawn to hear a case arising under the Act. Yet this is precisely the result of the conflict between the Ninth

Circuit decisions, another District of Columbia Circuit decision and the present matter previously discussed in the Petition. This conflict results in substantial confusion respecting the meaning, administration and enforcement of public rights under the National Historic Preservation Act; and without definitive resolution by this Court, compliance with the Act becomes difficult, uncertain and subject to departmental caprice.

Respondents wrongly assert that the Act involves the exercise of discretionary action by the Agriculture Department. The clear terms of the Act and its legislative history demonstrate that eligibility determinations are to be made only by the Interior Department and must be *"based exclusively on the objective application of professionally established criteria of historical significance". H.R. Rep. No. 96-1457*, 96th Cong., 2d. Sess., p. 30 (1980)[emphasis added].

Application of such criteria has led the Interior Department to list mountain masses identical to the Peaks in size and historical significance. Under no circumstances can the Agriculture Department arrogate to itself the power to ignore this Interior Department precedent, especially through post-hoc rationalizations of counsel respecting the alleged "uniqueness" of the Peaks vis-a-vis the other listed mountains. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, ___U.S.___, 103 S. Ct. 2856, 2866-2867 (1983); *FTC v. Texaco*, 417 U.S. 380, 397 (1974).

CONCLUSION

Based upon the foregoing and the reasons set forth in the Petition, we submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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